

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF OHIO  
3 WESTERN DIVISION

4 OLD GRANITE DEVELOPMENT, LTD., - Case No. 3:06-CV-2950  
5 Plaintiffs, - Toledo, Ohio  
6 v. - May 22, 2008  
7 CITY OF TOLEDO, - TRIAL  
8 Defendants. -  
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9  
10 VOLUME 4  
11 TRANSCRIPT OF TRIAL  
12 BEFORE THE HONORABLE JACK ZOUHARY  
13 UNITED STATES DISTRICT JUDGE, AND A JURY

14 APPEARANCES:

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Proceedings recorded by mechanical stenography,  
transcript produced by notereading.

08:24:55 1 (Reconvened at 8:24 a.m.)

08:24:55 2 MR. DAVIS: Plaintiff moves for admission of  
08:24:57 3 Exhibits 13, 14, 15 -- without objection we move for  
08:25:27 4 admission of Plaintiff's 13, 14, 15, 16, 17, 20, 30, 43,  
08:25:39 5 1, 6, 4, 9, 19, 20, I think I already said, 41, 83, 84,  
08:26:08 6 7, 45, 37, 18, 19, 97, 41, 8, 56, 95, 55, 58, 59. And  
08:27:14 7 those are all the ones we agreed on, Bob, with the  
08:27:17 8 exception of what was discussed last night with  
08:27:21 9 Laskey's. I don't think we talked about that.

08:27:23 10 THE COURT: Without objection from defense  
08:27:25 11 counsel, those exhibits will be admitted.

08:27:30 12 MR. DAVIS: The ones that defense counsel  
08:27:32 13 objects to are 91.

08:27:46 14 THE COURT: Basis for the objection?

08:27:48 15 MR. BAHRET: The only witness that I know of  
08:27:50 16 that was asked about that said he could not identify it.

08:27:56 17 MR. DAVIS: I believe there were several  
08:27:57 18 witnesses that identified that, weren't there?

08:27:59 19 THE COURT: Well, we have a disagreement.  
08:28:02 20 I'll have to look at my notes and see who talked about  
08:28:05 21 91. We'll reserve ruling on that.

08:28:08 22 MR. DAVIS: 5, which is the board showing  
08:28:16 23 the -- this board.

08:28:20 24 THE COURT: Are you offering 4 and 5?

08:28:24 25 MR. DAVIS: 4 came in without objection.

08:28:27 1 MR. BAHRET: The objection is the flow.

08:28:29 2 This never happened.

08:28:30 3 THE COURT: I do recall the testimony this  
08:28:31 4 was inaccurate in that respect. I will sustain the  
08:28:34 5 objection to Exhibit Number 5.

08:28:44 6 MR. DAVIS: Objection to Plaintiff's 92. I  
08:28:49 7 believe your objection there, Bob, is because of the red  
08:28:51 8 line.

08:28:52 9 MR. BAHRET: Yes. McCarthy put this on  
08:28:54 10 there. That's not from a surveyor or anything.  
08:28:57 11 There's no showing from any surveyor that he put it in  
08:29:00 12 the right place.

08:29:09 13 THE COURT: I will look at my notes on 92  
08:29:11 14 and reserve ruling on that as well.

08:29:24 15 MR. BAHRET: Can I just show you in no  
08:29:26 16 particular order --

08:29:28 17 Plaintiff's Exhibit 43 that we just talked  
08:29:33 18 about -- that was 91. I don't recall anybody saying 43  
08:29:41 19 had anything relevant either.

08:29:44 20 THE COURT: He read that in as admitted  
08:29:47 21 without objection.

08:29:49 22 MR. BAHRET: I think that was a mistake  
08:29:51 23 because the pile over here was the ones that we were  
08:29:53 24 opposing.

08:29:56 25 MR. DAVIS: I had 43 without a problem.

08:29:59 1 THE COURT: So you are having a problem with  
08:30:01 2 43?

08:30:06 3 MR. DAVIS: That was identified by Kevin  
08:30:09 4 Stawinski.

08:30:11 5 MR. BAHRET: Did he say it looked like the  
08:30:13 6 area in question? I don't recall anybody saying it had  
08:30:16 7 any relevance.

08:30:17 8 THE COURT: What does it depict? It is  
08:30:19 9 along the railroad tracks or at the end of the cul de  
08:30:22 10 sac?

08:30:22 11 MR. BAHRET: It's definitely not along the  
08:30:25 12 railroad tracks; that much I know.

08:30:26 13 THE COURT: Unless you can identify a  
08:30:29 14 witness who identified it for the record and that's  
08:30:33 15 relevant to the lawsuit, I'll sustain the objection and  
08:30:37 16 deny admission of Exhibit 43.

08:30:42 17 MR. BAHRET: 97. They handwrote 97A on  
08:30:47 18 here, which is a page out of the contract. They  
08:30:49 19 already got the contract in.

08:30:51 20 THE COURT: I will deny the admission of  
08:30:54 21 Exhibit 97A. The document's in evidence. A blowup is  
08:30:58 22 okay for demonstrative purposes, but not for admission  
08:31:01 23 in the jury room.

08:31:02 24 MR. BAHRET: 114 is the report from their  
08:31:05 25 appraiser. He's testified. I think typically reports

08:31:08 1 don't go in plus testimony; it's just the testimony.

08:31:11 2 THE COURT: Typically that's true.

08:31:13 3 MR. ROBON: The only reason I would want  
08:31:15 4 this one to go in is in the beginning, Judge, instead of  
08:31:19 5 coming up with just a typical value, he specifically  
08:31:23 6 listed certain lots.

08:31:24 7 THE COURT: He testified to that.

08:31:25 8 MR. ROBON: But I don't know which lots were  
08:31:29 9 which and prices which were --

08:31:30 10 THE COURT: I think he did. I recall that  
08:31:32 11 you summarized with him that testimony.

08:31:37 12 MR. DAVIS: Well, we would also argue the  
08:31:39 13 comparables that he said were in his report are brought  
08:31:44 14 into detail.

08:31:46 15 THE COURT: I understand. He did testify  
08:31:48 16 about that. And reports don't go in unless there's  
08:31:53 17 some good reason or unless there's a section of it that  
08:31:57 18 you agree.

08:31:57 19 MR. ROBON: I assume they'll keep Mr.  
08:32:01 20 Domini's out.

08:32:01 21 MR. BAHRET: I never intended to offer his.

08:32:03 22 THE COURT: 114 is denied.

08:32:07 23 MR. BAHRET: 116, frankly that wasn't on  
08:32:11 24 their exhibit list to begin with, but secondly, it shows  
08:32:15 25 a sale that doesn't even involve Old Granite. Bill

08:32:19 1 Shown bought the lot in 2002, built a house on it, and  
08:32:24 2 sold the house in 2005, which has nothing to do with  
08:32:28 3 this case.

08:32:29 4 THE COURT: We had testimony about this.  
08:32:31 5 And I will sustain the objection and deny admission of  
08:32:36 6 116.

08:32:38 7 MR. BAHRET: Then I'm not sure which ones of  
08:32:40 8 these they're offering. I just grabbed from the pile  
08:32:43 9 Plaintiff's 61, Plaintiff's 60, Plaintiff's -- I think  
08:32:50 10 that says 104 and 105, all of which are e-mails in the  
08:32:55 11 negotiation process of trying to deal with these  
08:32:57 12 problems.

08:33:00 13 THE COURT: Do you want to offer these?

08:33:01 14 MR. ROBON: I want to offer those, Judge.  
08:33:03 15 If there's any settlement things that Mr. Bahret is  
08:33:07 16 worried about, I think we can just redact them. But  
08:33:10 17 notice that was given to the City of Toledo by Mr.  
08:33:14 18 McCarthy --

08:33:15 19 MR. BAHRET: These have already been  
08:33:17 20 identified that he was all over it. There's no purpose  
08:33:20 21 of those other than his demands and the City's  
08:33:24 22 responses, which has nothing to do with proving your  
08:33:26 23 damages or enhancing your claim.

08:33:28 24 THE COURT: I tend to agree with defense  
08:33:30 25 counsel. Unless you can --

08:33:32 1 MR. ROBON: Well, it also shows that these  
08:33:33 2 e-mails were forwarded to her supervisors.

08:33:36 3 MR. BAHRET: What's the relevance of that?

08:33:38 4 MR. ROBON: The City administration became  
08:33:41 5 aware of all the problems.

08:33:42 6 THE COURT: I don't think that's an issue,  
08:33:45 7 that the City was aware of these problems. Whether it  
08:33:48 8 was Christy, her supervisor or boss, notice was  
08:33:51 9 presented. You've got testimony to that. I'm going to  
08:33:54 10 sustain the objection to these four exhibits and deny  
08:33:59 11 60, 61, 104, 105.

08:34:05 12 MR. DAVIS: There are several others we  
08:34:06 13 didn't have a chance to talk about because we discussed  
08:34:09 14 these at lunch time.

08:34:11 15 THE COURT: "We" being you two? We'll let  
08:34:14 16 you do that during lunchtime or a break. We'll do that  
08:34:18 17 after you've had a chance to talk so we don't take the  
08:34:20 18 jury's time.

08:34:21 19 And I have two that I have to rule on that I  
08:34:24 20 will take a look at my notes.

08:34:31 21 MR. BAHRET: On the video, DVD, did you  
08:34:35 22 bring a copy for me, Marv? Marv, did you bring a copy  
08:34:39 23 of this for me?

08:34:47 24 I'll just hand the DVD we played yesterday,  
08:34:51 25 a portion of it, we played it from station 175 to 189.

08:34:58 1 THE COURT: Have you marked it as an  
08:34:59 2 exhibit?

08:35:01 3 MR. BAHRET: We'll have to do that.

08:35:03 4 THE COURT: When you do that, let's do it  
08:35:05 5 all at once so we have it accurately for the record.

08:35:11 6 If there's nothing further, we'll bring  
08:35:14 7 the jury in. Before we start, are we going out of turn  
08:35:21 8 back again?

08:35:24 9 MR. ROBON: Yes.

08:35:25 10 THE COURT: There is a motion in limine that  
08:35:26 11 was filed yesterday. I don't know if plaintiff is  
08:35:30 12 intent on pursuing it. It was document Number 216, a  
08:35:45 13 motion in limine opposing the testimony of Todd Jenkins.  
08:35:49 14 I know counsel had some discussion. Is it still your  
08:35:53 15 intent to pursue that motion?

08:35:55 16 MR. ROBON: I didn't realize he was going to  
08:35:57 17 testify. We took his deposition, and he really didn't  
08:36:00 18 know anything.

08:36:00 19 MR. BAHRET: That is simply not true.

08:36:02 20 THE COURT: Just a moment. Relevancy is  
08:36:05 21 another issue we can address when he takes the witness  
08:36:07 22 stand. The purpose of this motion was indicating that  
08:36:10 23 he was not disclosed. I know counsel had a  
08:36:12 24 conversation about disclosure. You're now indicating  
08:36:15 25 you did depose him, and for some reason I know on the



08:36:18 1 first date of the trial his name was added to the  
08:36:21 2 witness list that we showed the jury during voir dire  
08:36:25 3 and that I provided to my court staff. So when you all  
08:36:30 4 learned of it, I can't say, but if you're indicating he  
08:36:33 5 was deposed, it sounds like there's no surprise there.  
08:36:36 6 I'll deny the motion in limine. Obviously plaintiff  
08:36:38 7 can reserve the right to object to the relevancy of his  
08:36:41 8 testimony. We'll address that later.

08:36:43 9 Mr. McCarthy, are you going to be the first  
08:36:45 10 witness? I'm going to have you come up, and our  
08:36:52 11 courtroom deputy will swear you in.

08:37:30 12 (The witness was sworn by the clerk.)

08:40:54 13 (The jury enters the courtroom.)

08:40:54 14 THE COURT: Good morning, ladies and  
08:40:56 15 gentlemen. We are back on the record. And you may  
08:41:02 16 recall yesterday we had a witness taken out of turn.  
08:41:05 17 We're back with the plaintiff again for a witness. This  
08:41:07 18 is a plaintiff's witness offered on behalf of their  
08:41:11 19 case. He has been sworn before taking the stand. And  
08:41:14 20 we're ready to go.

08:41:15 21 MR. ROBON: Thank you.

08:41:16 22 - - -

08:41:16 23 MICHAEL MCCARTHY, DIRECT EXAMINATION

08:41:16 24 BY MR. ROBON:

08:41:16 25 Q. Would you introduce yourself to the jury. Tell

08:41:19 1 the jury who you are, your background, where you grew  
08:41:21 2 up, your education, and where you live?

08:41:23 3 A. Michael McCarthy. I live at 30332 Jacqueline  
08:41:28 4 Place in Perrysburg, Ohio.

08:41:30 5 Q. That's in Cambridge?

08:41:31 6 A. The Cambridge Subdivision. Grew up in  
08:41:34 7 Perrysburg, went to high school there, went to college  
08:41:38 8 at the University of Toledo. Currently in real estate,  
08:41:41 9 commercial real estate for the last nine years.

08:41:44 10 Q. And you know Mr. Laskey?

08:41:47 11 A. Yes.

08:41:48 12 Q. And you moved into that spec house that he had on  
08:41:50 13 lot 15?

08:41:51 14 A. Yes, in February '06.

08:41:53 15 Q. And you're still living there?

08:41:55 16 A. Yes.

08:41:55 17 Q. Are you delinquent on the rent?

08:41:57 18 A. Yes.

08:41:59 19 Q. Tell the jury one of your purposes of originally  
08:42:02 20 living there.

08:42:03 21 A. In part to help market the house, furnish it.  
08:42:10 22 Homes show better when they have furniture in it. We've  
08:42:14 23 got some nice stuff.

08:42:15 24 Q. And was it your -- tell the jury whether or not  
08:42:19 25 there was an intention on your part perhaps to buy the

08:42:22 1 house if it didn't sell.

08:42:24 2 A. Yeah, I had an interest in buying the house if it  
08:42:27 3 had not sold.

08:42:28 4 Q. And Mr. Laskey testified that he had \$539,000  
08:42:33 5 into the house with the lot. Does that sound right?

08:42:36 6 A. That sounds right.

08:42:39 7 Q. Tell the jury in April of '06 what happened that  
08:42:46 8 really affects the house?

08:42:49 9 A. Well, obviously the tree clearing, just the  
08:42:51 10 general condition around the house, and the neighborhood  
08:42:56 11 is not conducive to really being --

08:43:01 12 Q. You have how many children?

08:43:03 13 A. We have three.

08:43:06 14 Q. If you were to buy the house today, what would  
08:43:09 15 you pay for that house?

08:43:12 16 A. \$275,000, about \$275,000.

08:43:16 17 Q. And you know it's in foreclosure?

08:43:18 18 A. Yes.

08:43:19 19 Q. Now, you took a couple of videos and some  
08:43:23 20 photographs of some flooding, correct?

08:43:28 21 A. Yes.

08:43:28 22 (Videotape is shown in open court.)

08:43:28 23 Q. I would like you to look on the screen and tell  
08:43:31 24 the jury -- it's not a professional, needless to say,  
08:43:38 25 but tell the jury what you're looking at. You took the

08:43:41 1 videos, right?

08:43:42 2 A. Yes.

08:43:43 3 Q. And tell the jury which way the water is flowing?

08:43:47 4 A. The water would be flowing from the left of the  
08:43:51 5 screen to an area just right of those utility boxes.

08:43:57 6 Q. So is it coming from another -- it's not coming  
08:44:01 7 from the subdivision lots; it's coming from lot 16 and  
08:44:05 8 coming from the railroad?

08:44:06 9 A. It's coming from --

08:44:07 10 MR. BAHRET: Objection.

08:44:09 11 A. It's coming from the left neighboring property  
08:44:12 12 along the railroad line there. The lots come to a  
08:44:15 13 point there.

08:44:19 14 THE COURT: Objection was overruled.

08:44:27 15 Q. Now, where is this photograph? That's the  
08:44:33 16 adjoining property?

08:44:39 17 A. Yes.

08:44:41 18 Q. Where is your backyard? Tell us when your  
08:44:44 19 backyard starts.

08:44:51 20 A. It's coming into view.

08:44:55 21 MR. ROBON: Can you freeze right there?

08:44:55 22 (The video is paused.)

08:45:01 23 THE VIDEOGRAPHER: The resolution goes down.

08:45:03 24 BY MR. ROBON:

08:45:03 25 Q. My question is, when the jury -- when it turns

08:45:07 1 back on, you're standing near the railroad towards your  
08:45:10 2 house?

08:45:11 3 A. Right.

08:45:11 4 Q. And the water's coming -- you're standing on the  
08:45:14 5 railroad?

08:45:15 6 MR. BAHRET: Objection.

08:45:16 7 THE COURT: We need to have the witness  
08:45:17 8 testify.

08:45:19 9 MR. ROBON: I want to know which way the  
08:45:20 10 water is coming.

08:45:23 11 A. It's coming from the right to left as I'm looking  
08:45:25 12 towards the house.

08:45:26 13 Q. And you're standing on the railroad?

08:45:32 14 A. Right.

08:45:51 15 Q. Tell us when your yard shows up.

08:45:56 16 (Video continues.)

08:46:10 17 A. It's coming into view.

08:46:12 18 Q. Is that in the upper --

08:46:14 19 A. Upper left.

08:46:16 20 Q. And where is this water going?

08:46:21 21 A. It's going into the manhole or drainage for the  
08:46:25 22 subdivision, just to the left of the utility boxes.

08:46:39 23 Q. That's the first one. Show this second one,  
08:46:44 24 please.

08:46:44 25 THE COURT: Did we identify when that video

08:46:46 1 was taken?

08:46:47 2 BY MR. ROBON:

08:46:47 3 Q. Do you recall the month or even the year?

08:46:56 4 A. Well, it would be in late '06.

08:47:02 5 Q. What about the second video?

08:47:08 6 A. Actually, this would be in February.

08:47:11 7 Q. Of?

08:47:12 8 A. Of '07 -- excuse me, of '08.

08:47:15 9 Q. This year?

08:47:16 10 A. Yeah.

08:47:36 11 Q. And the water is running where, here?

08:47:38 12 A. It's running to the right, or towards the back of  
08:47:42 13 my yard.

08:47:43 14 Q. You have a good close-up there?

08:47:53 15 A. That's the neighboring lot on the neighboring  
08:47:55 16 property where the water is coming from.

08:48:10 17 MR. ROBON: That's it.

08:48:11 18 (Videotape is off.)

08:48:37 19 MR. ROBON: This is our paralegal's husband,  
08:48:40 20 Judge, who's volunteered to do this for us.

08:48:43 21 THE COURT: Thank you.

08:48:45 22 THE VIDEOGRAPHER: My pleasure.

08:48:53 23 MR. ROBON: What should I do, Judge, as far  
08:48:55 24 as offering the video into evidence?

08:48:58 25 THE COURT: We'll do that later.

08:49:02 1 (Discussion had off the record.)

08:49:12 2 BY MR. ROBON:

08:49:13 3 Q. Mr. McCarthy, why did you take the videos?

08:49:18 4 A. It seemed alarming that that was happening.

08:49:21 5 Q. Would you tell the jury how often since February  
08:49:25 6 of '06 when you moved in that the water has been in the  
08:49:28 7 backyard doing that?

08:49:30 8 A. It isn't uncommon. A good rain will create that  
08:49:34 9 situation.

08:49:35 10 Q. And how long does it take for your yard to dry  
08:49:39 11 out in the summertime, or does it ever dry out?

08:49:45 12 A. No, it does dry out when it's dry. But there's  
08:49:51 13 an area of standing water that's there pretty much all  
08:49:55 14 the time.

08:50:04 15 MR. ROBON: No further questions, Your  
08:50:06 16 Honor.

08:50:06 17 THE COURT: Thank you.

08:50:09 18 - - -

08:50:09 19 MICHAEL MCCARTHY, CROSS-EXAMINATION

08:50:11 20 BY MR. BAHRET:

08:50:11 21 Q. Good morning, sir.

08:50:20 22 A. Good morning.

08:50:21 23 Q. My name is Bob Bahret. I represent the City of  
08:50:25 24 Toledo. I don't think you and I ever met before, did  
08:50:28 25 we?

08:50:28 1 A. I don't think so.

08:50:29 2 Q. But somebody on behalf of the City, one of the  
08:50:32 3 other attorneys in my office participated in your  
08:50:34 4 deposition?

08:50:35 5 A. That's right.

08:50:36 6 Q. All right. The home where you live, you've  
08:50:45 7 already indicated that you're not paying anything for  
08:50:48 8 it?

08:50:49 9 A. No, I'm paying utilities.

08:50:52 10 Q. But you're not paying Old Granite?

08:50:55 11 A. Not paying rent, correct.

08:50:58 12 Q. As far as your background, you're in real estate?

08:51:01 13 A. Correct. Yes.

08:51:02 14 Q. Commercial?

08:51:03 15 A. Yes.

08:51:04 16 Q. Never worked in residential real estate?

08:51:06 17 A. Never.

08:51:06 18 Q. Never have in your life? Have you tried to  
08:51:08 19 market a house except for maybe something you owned  
08:51:11 20 yourself?

08:51:11 21 A. No, never marketed.

08:51:15 22 Q. And you didn't actually appraise the house you're  
08:51:19 23 living in free, did you?

08:51:21 24 A. No.

08:51:21 25 Q. You know that that house was up for sale before



08:51:24 1 you moved into it?

08:51:25 2 A. Yes.

08:51:25 3 Q. And you know that not a single person put a bid  
08:51:28 4 in on it?

08:51:30 5 A. There was no bids that I'm aware of, no.

08:51:32 6 Q. And there hasn't been any bid since you moved in  
08:51:35 7 either?

08:51:35 8 A. No.

08:51:36 9 Q. Including the time after you moved in and in  
08:51:40 10 those months before trees were cut?

08:51:42 11 A. Yeah, a couple months, right.

08:51:45 12 Q. The house isn't even up for sale now, is it?

08:51:49 13 A. It is available, but I don't believe it's being  
08:51:52 14 marketed.

08:51:53 15 Q. How would one know it's available if it's not  
08:51:56 16 being marketed? There's no sign in the yard; nobody's  
08:52:00 17 advertising anything? You mean it's for sale just like  
08:52:05 18 anything's for sale; somebody could knock at my door and  
08:52:09 19 say, hey, I'll pay you for your house?

08:52:11 20 A. I guess I can't answer that.

08:52:12 21 Q. Would you agree that no effort is being made by  
08:52:14 22 anybody to sell your house above and beyond whatever  
08:52:17 23 efforts I'm making to sell my house?

08:52:20 24 MR. ROBON: Objection.

08:52:22 25 A. I can't say --

08:52:24 1 THE COURT: I'll sustain. He probably  
08:52:26 2 doesn't know what efforts you're making.

08:52:28 3 Q. If I told you that my house is not up for sale;  
08:52:30 4 it's not advertised; there's no signs in the yard; does  
08:52:33 5 that sound just like yours?

08:52:37 6 A. The house is in a subdivision that they're  
08:52:40 7 marketing lots. The house is intended to be a model  
08:52:43 8 home. If we encountered someone that was interested in  
08:52:47 9 the house, we would make them aware it is for sale.

08:52:51 10 Q. And how would you encounter somebody that was  
08:52:53 11 interested in the house without doing any marketing?

08:52:56 12 A. Well, just by living there is a form of  
08:52:59 13 marketing. We do live in the area.

08:53:01 14 Q. Okay. But if one would drive into that  
08:53:04 15 neighborhood, how on earth would one know that that  
08:53:07 16 house is available?

08:53:08 17 A. By looking at it from the street you would not  
08:53:10 18 know it's available for sale.

08:53:13 19 Q. Your wife currently works for Mr. Laskey?

08:53:17 20 A. Yes.

08:53:20 21 Q. The house that you're living in is about 2,700  
08:53:24 22 square feet?

08:53:25 23 A. Approximately, a little less, I think.

08:53:29 24 Q. Is it true that you really have no idea what the  
08:53:32 25 fair market value of that house is?

08:53:38 1 A. I understand through an appraisal it was worth at  
08:53:41 2 one time \$310,000.

08:53:43 3 Q. Do you have any idea what the house is worth?

08:53:47 4 A. I have an idea what I would pay for it.

08:53:49 5 Q. Do you have any idea what it is worth?

08:53:54 6 A. I suppose yes, I mean, comparing -- I mean, it's  
08:53:59 7 2,600, 2,700 square feet. At \$100 a square foot it  
08:54:05 8 would be about \$260,000, \$270,000.

08:54:08 9 Q. Okay. And what you just said, the \$100 a square  
08:54:13 10 foot, that's a fairly common measuring tool on values of  
08:54:17 11 homes; is it not?

08:54:18 12 A. It's a nice round number for construction.

08:54:25 13 Q. I mean, if this home were to be marketed for  
08:54:28 14 \$550,000 or something like that, that would be almost  
08:54:33 15 double; it would be close to \$200 a square foot, right?

08:54:39 16 A. Yes.

08:54:40 17 Q. You wouldn't pay that, would you?

08:54:43 18 A. No. But it was marketed as a 5,000 square foot  
08:54:49 19 house originally.

08:54:52 20 Q. It was originally marketed as a 5,000 square foot  
08:54:56 21 house?

08:54:56 22 A. Correct. It is -- there's areas in the house  
08:54:59 23 that aren't completed that could be completed to suit  
08:55:03 24 someone, the buyer, whether it be the area up above the  
08:55:08 25 garage or in the basement, which is a walkout basement.

08:55:11 1 Q. Okay. So if you included the basement space and  
08:55:15 2 the attic space, then you could say it's 5,000 square  
08:55:18 3 feet?

08:55:19 4 A. That's what I understand, yes.

08:55:23 5 Q. My understanding is you've never paid anything.  
08:55:35 6 It's not just that you're not current in your payments;  
08:55:38 7 you've never paid?

08:55:39 8 A. I've never paid any cash.

08:55:48 9 Q. The photograph that started that video with the  
08:55:54 10 ponding in your backyard, do you remember that  
08:55:57 11 photograph? I forget the number, but it was taken in  
08:56:01 12 December of '06. Here we go. 37.

08:56:06 13 A. Yes.

08:56:14 14 MR. BAHRET: I guess I can't do it this way.  
08:56:33 15 You can see I'm a real techno wizard here,  
08:56:37 16 Mr. McCarthy.

08:56:39 17 THE COURT: It takes a second to warm up.

08:56:44 18 Q. This here, you took this picture with, I'm  
08:56:47 19 assuming, a digital camera?

08:56:48 20 A. Uh-huh.

08:56:49 21 Q. That's the date stamp?

08:56:50 22 A. Yes.

08:56:51 23 Q. So you took it December 1, '06. My  
08:56:53 24 understanding, sir, is that's the absolute worst ponding  
08:56:57 25 that you've seen in your yard.

08:57:01 1 A. That would be approximately. It's been like  
08:57:04 2 that before, but that's about as worse as it's been  
08:57:08 3 through the time period.

08:57:09 4 Q. If I'm hearing you right, it's been like that  
08:57:12 5 more than once?

08:57:13 6 A. Yes.

08:57:13 7 Q. But it's never been worse than that?

08:57:15 8 A. No, not much worse than that.

08:57:17 9 Q. What did you say?

08:57:19 10 A. Not much worse than that.

08:57:24 11 Q. And that photograph was taken right after a major  
08:57:28 12 snowfall had melted?

08:57:31 13 A. I wouldn't know what a major snowfall is, but  
08:57:34 14 there was a good deal of snow that had melted, yes.

08:57:38 15 Q. If I used the word -- you have reviewed your  
08:57:41 16 deposition transcript, sir?

08:57:42 17 A. Yes.

08:57:42 18 Q. And in the deposition we agreed that it was a  
08:57:46 19 substantial snow that melted; you'd stand by that?

08:57:49 20 A. That sounds right, yes.

08:57:51 21 Q. And when this sort of thing happens, it's after a  
08:57:55 22 pretty darn good snowfall, not just a dusting, or a  
08:58:00 23 pretty good rain fall?

08:58:02 24 A. Correct.

08:58:04 25 Q. Like when we were out in your yard the other day

08:58:07 1 on Monday, obviously you know it had rained Sunday,  
08:58:12 2 correct?

08:58:12 3 A. I wasn't here Sunday.

08:58:14 4 Q. All right. If I told you it did rain Sunday but  
08:58:18 5 yet your yard was still dry, would you believe me?

08:58:22 6 A. That it had rained Sunday and on Monday it was  
08:58:25 7 dry?

08:58:26 8 Q. Yeah.

08:58:26 9 A. Would I believe you? Sure.

08:58:28 10 Q. In fact, you know that your yard near that catch  
08:58:31 11 basin Monday afternoon was dry?

08:58:36 12 A. It could be dry. I wasn't there.

08:58:43 13 Q. Let's talk about the train. When you moved in,  
08:58:46 14 even actually before you moved in, you knew there was  
08:58:50 15 trains going right by the backyard?

08:58:51 16 A. I did.

08:58:52 17 Q. You could see the train; could you not?

08:58:54 18 A. You can see them, yes.

08:58:56 19 Q. And that is before the trees were cut?

08:58:58 20 A. Yes.

08:59:00 21 Q. Okay. And you could hear the train, correct?

08:59:02 22 A. Yes.

08:59:02 23 Q. In fact, you could really hear the train; could  
08:59:05 24 you not?

08:59:06 25 A. I can hear the train.

08:59:08 1 Q. The train even woke you up at night, didn't it?

08:59:11 2 A. No. No.

08:59:39 3 Q. Do you see this transcript page?

08:59:41 4 A. Yes.

08:59:41 5 Q. It's your deposition page 49. And you see the  
08:59:44 6 item next to Number 3?

08:59:46 7 A. Uh-huh.

08:59:48 8 Q. Do you see where you were asked if the train  
08:59:52 9 noise -- that's what we're talking about; if you want me  
08:59:55 10 to go back to the prior page to put it in context, I'd  
08:59:58 11 be glad to, but you see the question: "Is that  
09:00:00 12 something that your kids have had to get used to, and  
09:00:04 13 does it disturb them in their sleep?"

09:00:07 14 MR. ROBON: I object, Your Honor. I don't  
09:00:09 15 think that's the question he asked. He asked if it  
09:00:12 16 woke him up.

09:00:13 17 A. Yes.

09:00:13 18 Q. Let me rephrase it because you're absolutely  
09:00:16 19 right.

09:00:17 20 The trains disturb your children's sleep; is that  
09:00:21 21 right?

09:00:21 22 A. I believe so.

09:00:25 23 Q. I mean, the trains go day and night; do they not?

09:00:28 24 A. Yes.

09:00:28 25 Q. And every time they get near Bates Road,

09:00:31 1 regardless of what direction they're coming from,  
09:00:34 2 they're blowing their whistle?

09:00:36 3 A. Yes.

09:00:37 4 Q. In fact, directly -- if the train is coming from  
09:00:41 5 Ford Road towards Bates Road, behind your house is one  
09:00:44 6 of the whistle stations; is it not?

09:00:47 7 A. Yes, it seems that way.

09:00:49 8 Q. So when the train is 150 feet from the back of  
09:00:52 9 your house, it's hammering that whistle?

09:00:54 10 A. Yes. Yes.

09:00:58 11 Q. If you're outside, you're in the backyard when  
09:01:01 12 the train is going by, and you were having a  
09:01:03 13 conversation, you'd stop for a minute to let the train  
09:01:07 14 go by; would you not?

09:01:08 15 MR. ROBON: Are you talking before or after?

09:01:12 16 MR. BAHRET: Both.

09:01:13 17 A. It can at times, yes.

09:01:16 18 Q. And in fact, its tough to have a normal  
09:01:21 19 conversation with the train going by?

09:01:24 20 A. In the backyard?

09:01:25 21 Q. Yes.

09:01:27 22 A. Yes.

09:01:32 23 Q. Now, I understand that you can probably see the  
09:01:34 24 train; I mean, you already told us that you could see it  
09:01:39 25 before the trees were taken out. You probably can see



09:01:42 1 it even easier now?

09:01:44 2 A. Yes.

09:01:44 3 Q. But there was never any secret even before the  
09:01:47 4 trees were removed that this is an active railroad; I  
09:01:50 5 can see it; I can hear it; and I can feel it?

09:01:55 6 A. Yes. But not as prominently as today.

09:02:00 7 Q. And that would be true -- are you generally  
09:02:03 8 familiar with this subdivision?

09:02:04 9 A. Yes.

09:02:05 10 Q. That would be true even on any of those lots that  
09:02:11 11 face the back, lots 9 through 16?

09:02:15 12 A. Yes.

09:02:16 13 Q. And especially when you start going down lots 9,  
09:02:20 14 10, 11, 12, 13, down there it was pretty sparse to begin  
09:02:25 15 with, correct?

09:02:26 16 A. Sparse?

09:02:27 17 Q. Not much trees, and may have been some brambles  
09:02:33 18 and things like that, but in the video we saw we didn't  
09:02:36 19 see that many trees?

09:02:40 20 MR. ROBON: Do you mean before the cutting?

09:02:43 21 MR. BAHRET: The video was taken before  
09:02:45 22 there was any cutting.

09:02:46 23 MR. ROBON: You're talking about the Ric-man  
09:02:48 24 video?

09:02:49 25 MR. BAHRET: Can I do this alone?

09:02:53 1 THE COURT: We have had a couple videos, so  
09:02:55 2 it's appropriate, I think, to make sure which one we're  
09:02:58 3 talking about.

09:02:59 4 A. Are you asking if the trees are denser by my  
09:03:03 5 house or further south, or are they less dense? I'm not  
09:03:08 6 sure what the question is.

09:03:09 7 Q. Okay. That's a fair comment. Anytime I ask a  
09:03:12 8 question that you didn't follow me --

09:03:14 9 A. Right.

09:03:14 10 Q. You did it just exactly right. Make me clear it  
09:03:18 11 up. I'll be glad to do it.

09:03:19 12 A. Okay.

09:03:20 13 Q. What I'm referencing is down on the other end of  
09:03:24 14 the subdivision closest to Ford Road, was it less dense  
09:03:31 15 vegetation down there than it was at your end, if you  
09:03:36 16 know?

09:03:38 17 A. My house starts at -- that's where the lots  
09:03:44 18 border the railway. So any lots going towards Ford  
09:03:55 19 Road, yes. If you look to the right, those lots to the  
09:03:59 20 right, the vegetation, as you got further to the right,  
09:04:03 21 to me it appeared more dense than it was towards my  
09:04:08 22 house.

09:04:08 23 Q. It was more dense down there?

09:04:09 24 A. Right. It was --

09:04:12 25 Q. But that -- the subdivision, the back of the

09:04:16 1 subdivision actually is a little further from the  
09:04:19 2 railroad right-of-way over there.

09:04:20 3 A. That's right. Yes.

09:04:21 4 Q. So the trees down there were on the railroad  
09:04:24 5 right-of-way?

09:04:26 6 A. I wouldn't know one way or the other.

09:04:29 7 Q. Okay. Sir, you've never had any water in your  
09:04:46 8 house or any damage to your personal property because of  
09:04:49 9 this ponding issue, have you?

09:04:51 10 A. No.

09:04:58 11 Q. You were aware there was ponding in that area  
09:05:00 12 that the photograph was taken in even before the City  
09:05:04 13 water main was installed?

09:05:07 14 A. I'm not aware of it, there was any ponding.

09:05:13 15 Q. I'll get back to that point when I find the note.  
09:05:26 16 You had walked on the property adjacent to yours  
09:05:32 17 before the water main was put in?

09:05:35 18 A. Yes.

09:05:36 19 Q. In other words, lot 16 and the property that  
09:05:39 20 abuts lot 16?

09:05:40 21 A. Yes.

09:05:41 22 Q. And when you walked on that even before the water  
09:05:43 23 main was put in, you noticed some sort of ponding issue  
09:05:47 24 there; did you not?

09:05:49 25 A. Well, there was a collection area.

09:05:52 1 Q. Of water?

09:05:53 2 A. Yeah, some water, yes.

09:05:54 3 Q. And that was always wet; was it not?

09:05:58 4 A. Yes. But it -- yes.

09:06:03 5 Q. Did you ever see a duck in there?

09:06:05 6 A. No.

09:06:09 7 Q. Your yard. Your yard, sir, was -- you didn't  
09:06:18 8 just walk up a hill to the railroad right-of-way before  
09:06:20 9 the project and what your dad did. There was a wall  
09:06:25 10 there, correct?

09:06:26 11 A. Correct.

09:06:26 12 Q. And that wall was railroad ties up -- it's been  
09:06:30 13 estimated five or six feet high or something like that?

09:06:33 14 A. Four to six feet, somewhere in there.

09:06:36 15 Q. And nobody cleared anything from the downside of  
09:06:41 16 your backyard? All the clearing was done up above the  
09:06:46 17 wall and over, correct?

09:06:49 18 A. Right, on the top of the plateau.

09:06:55 19 Q. By the way, do you know of any efforts that have  
09:06:58 20 been undertaken at all by you or anybody to plant any  
09:07:02 21 vegetation on the back parts of old Cambridge -- I mean  
09:07:08 22 Old Granite's Cambridge Subdivision?

09:07:10 23 A. No, I'm not aware of anything.

09:07:13 24 Q. You would agree -- you know your dad is a guy  
09:07:17 25 that orchestrated moving in all this dirt after the

09:07:20 1 vegetation was cut?

09:07:21 2 A. Yes.

09:07:21 3 Q. And you know that he and his helpers dumped so  
09:07:25 4 much dirt that they pushed it deep into your yard and  
09:07:31 5 the lots next to you and absolutely covered that wall?

09:07:36 6 A. It covers the wall.

09:07:37 7 Q. The wall is gone now, correct?

09:07:39 8 A. You can't see the wall, no.

09:07:46 9 Q. Is it true that you never complained to the  
09:07:49 10 people that were clearing the trees or asked them to  
09:07:51 11 either move further away or stop?

09:07:56 12 A. No, I didn't. They just -- I didn't know it was  
09:08:03 13 my --

09:08:06 14 Q. Do you know if there was any ponding on your yard  
09:08:12 15 as shown in Exhibit 37, again, before your dad put  
09:08:23 16 thousands of tons of dirt on the Cambridge property?

09:08:29 17 A. Was there any prior -- I don't believe so.

09:08:33 18 Q. Do you know if there was any problem like we see  
09:08:36 19 on Exhibit 37 before your dad, without any authority or  
09:08:40 20 permission from anybody, knocked a hole in the drainage  
09:08:44 21 pipe owned by the railroad?

09:08:47 22 A. I'm not aware that he knocked a hole in the  
09:08:50 23 drainage pipe.

09:09:09 24 Q. You were familiar with lot 15 even before you  
09:09:11 25 moved in; were you not?

09:09:13 1 A. Yes.

09:09:14 2 Q. I'll ask you again if there was any ponding on  
09:09:16 3 that property before the water main project?

09:09:27 4 A. In that area as we're discussing in the exhibit?  
09:09:31 5 What are you asking me again?

09:09:33 6 Q. Was there ponding water in the back of your  
09:09:38 7 property to some extent after heavy rains and heavy  
09:09:43 8 snows? And that's prior to the water main project.

09:09:46 9 A. There was a little area to the right in a  
09:09:48 10 different area right at the edge of where the railroad  
09:09:53 11 tie wall once was, just that area.

09:10:03 12 Q. Have you seen any ponding issues further down the  
09:10:08 13 subdivision, the lots -- you're 15; 13, 14, 12, so on  
09:10:17 14 and so forth?

09:10:18 15 A. I haven't seen any going that direction.

09:10:22 16 Q. If counsel made a comment that there's a ponding  
09:10:25 17 problem on those lots that was never there before,  
09:10:27 18 that's simply false?

09:10:29 19 MR. ROBON: Objection.

09:10:29 20 A. I don't know the answer.

09:10:33 21 MR. ROBON: Mike, you can't talk when  
09:10:35 22 there's an objection until the Judge says so.

09:10:38 23 THE COURT: Let me ask you all to pause for  
09:10:40 24 a moment.

09:10:46 25 I think you can rephrase the question.

09:10:47 1 I'll sustain the objection.

09:10:49 2 Q. You have never seen any ponding on any lot next  
09:10:55 3 to you except for 16. So 14 -- you've never seen  
09:10:59 4 ponding on 14, 13, 12, 11, 10, or 9?

09:11:04 5 A. No, I've never walked over there and observed it.  
09:11:08 6 But I've never seen it, no.

09:11:09 7 Q. You've been in your backyard? I'm assuming that  
09:11:12 8 when you look at the ponding in your yard you may look  
09:11:14 9 around?

09:11:15 10 A. Yeah. But you don't have a straight line view  
09:11:18 11 of the edge of the property. But I have not seen any  
09:11:22 12 ponding.

09:11:29 13 Q. You're aware that when your dad dumped all this  
09:11:54 14 dirt he covered one of the catch basins?

09:11:54 15 A. I'm not sure if he covered the catch basin or  
09:11:54 16 not.

09:11:54 17 Q. You're aware he at least partially covered one of  
09:11:54 18 the catch basins; are you not?

09:11:54 19 A. I believe there was dirt there, and there was a  
09:11:54 20 rainfall, and some of the dirt had tumbled onto the  
09:11:54 21 catch basin.

09:12:06 22 Q. You saw the manhole that's up beyond -- it's not  
09:12:12 23 on your property; it's down, I don't know how far, I'll  
09:12:15 24 say 200 feet or something like that?

09:12:16 25 A. Okay. Yes.

09:12:18 1 Q. If my estimate of distance is wrong, just rely on  
09:12:21 2 your own recollection where it is.

09:12:22 3 A. Okay.

09:12:23 4 Q. But you know the manhole I'm talking about?

09:12:26 5 A. Yes.

09:12:27 6 Q. Closer to Bates Road than your house is?

09:12:29 7 A. Yes.

09:12:30 8 Q. You had seen that even before the project, the  
09:12:32 9 water project?

09:12:35 10 A. I believe so, yes.

09:12:36 11 Q. And you would describe that as looking like some  
09:12:39 12 sort of an abandoned, dilapidated pipe sticking out of  
09:12:44 13 the ground at that point, correct?

09:12:45 14 A. In the neighboring property or the other  
09:12:48 15 direction?

09:12:49 16 Q. Towards Bates Road.

09:12:51 17 A. Yeah.

09:12:51 18 Q. The one at the top of the hill.

09:12:54 19 A. Yes.

09:12:55 20 Q. I mean, you saw it? I'm not saying you  
09:12:58 21 investigated it or studied it, but you at least saw it,  
09:13:02 22 knew it was there, and it looked like a wrecked up mess?

09:13:05 23 A. Yeah. In exploring in that area shortly after  
09:13:09 24 moving in, that area where we talked about earlier where  
09:13:13 25 there's some ponding, there appeared to be some sort of



09:13:17 1 a pipe drainage system.

09:13:26 2 Q. You didn't know if it worked?

09:13:27 3 A. I didn't understand its purpose or if it worked.

09:13:46 4 Q. And you personally have not done anything to  
09:13:48 5 determine if any of the vegetation or trees that were  
09:13:51 6 cut were on Cambridge property, did you?

09:13:54 7 A. No.

09:13:56 8 MR. BAHRET: Thank you, sir.

09:13:58 9 THE WITNESS: Thank you.

09:13:58 10 THE COURT: Redirect?

09:13:59 11 MR. ROBON: Thank you, Your Honor.

09:14:02 12 - - -

09:14:02 13 MICHAEL MCCARTHY, REDIRECT EXAMINATION

09:14:03 14 BY MR. ROBON:

09:14:03 15 Q. When Mr. Bahret asked you about the lots, your  
09:14:12 16 house is here. He asked about whether there was water  
09:14:15 17 on these other lots. Can you tell the jury how deep  
09:14:20 18 the weeds and the brush is, it slopes down, would you  
09:14:24 19 even see water if it was there?

09:14:25 20 A. They're minimum knee-high.

09:14:28 21 Q. Could you see the water if it was there?

09:14:30 22 A. Probably not if it were there, no.

09:14:33 23 Q. And when this photograph was taken, did the water  
09:14:44 24 also go onto the lot next door, the pond?

09:14:50 25 MR. BAHRET: Which next door?

09:14:52 1 MR. ROBON: To the south.

09:14:53 2 A. It covered, yes, the entire lot and into the lot  
09:14:56 3 next door.

09:14:58 4 MR. ROBON: Nothing further.

09:15:01 5 - - -

09:15:01 6 MICHAEL MCCARTHY, RECROSS-EXAMINATION

09:15:02 7 BY MR. BAHRET:

09:15:02 8 Q. When you say the lot next door, you're talking  
09:15:04 9 about 16?

09:15:05 10 A. To the right as I'm looking at the front of the  
09:15:07 11 house.

09:15:07 12 MR. ROBON: Lot 14.

09:15:09 13 A. 14, 15 -- I don't know the numbers.

09:15:13 14 THE COURT: What's easiest for you? As  
09:15:15 15 you're standing in the driveway of your home and looking  
09:15:17 16 towards the back of your house, to the right or to the  
09:15:20 17 left?

09:15:21 18 MR. ROBON: We're looking at Exhibit  
09:15:24 19 Number --

09:15:24 20 THE COURT: Mr. McCarthy?

09:15:25 21 THE WITNESS: The right of the house as I  
09:15:27 22 look to the front of the house.

09:15:29 23 THE COURT: So if you're standing at the  
09:15:31 24 back of the house, looking to the front of the house, it  
09:15:34 25 would be to the right?

09:15:35 1 THE WITNESS: It would be to left.

09:15:38 2 THE COURT: You can point out.

09:15:39 3 MR. ROBON: You live on lot 15. We want to  
09:15:41 4 know, is it this lot or this lot?

09:15:43 5 A. The water comes through here and across the back  
09:15:47 6 yard into this (motioning).

09:15:48 7 MR. ROBON: It comes from 16 into 15 into  
09:15:53 8 14?

09:15:53 9 THE WITNESS: Yes.

09:15:54 10 MR. ROBON: Nothing further.

09:15:56 11 MR. BAHRET: Nothing further.

09:15:57 12 THE COURT: You may step down. Thank you.

09:16:07 13 We're now going to be like a yo-yo and go  
09:16:10 14 back to defendant's case. The record should reflect  
09:16:13 15 the plaintiff is resting subject to admission of  
09:16:16 16 exhibits and subject to a motion which we will take care  
09:16:19 17 of outside the presence of the jury. And the defendant  
09:16:23 18 may call its next witness.

09:16:26 19 MR. BAHRET: I'll call Bob Domini, Robert  
09:16:29 20 Domini.

09:17:31 21 MR. WATKINS: Your Honor, can we approach  
09:17:32 22 briefly?

09:17:33 23 THE COURT: Sure.

09:17:46 24 (The witness was sworn by the clerk.)

09:17:47 25 (Discussion had off the record.)

09:18:12

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09:18:12

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ROBERT DOMINI, DIRECT EXAMINATION

09:18:13

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BY MR. BAHRET:

09:18:13

4

Q. Good morning.

09:18:27

5

A. Good morning.

09:18:28

6

Q. Would you state your full name for the jury?

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7

A. Robert Domini.

09:18:33

8

Q. Mr. Domini, how old are you?

09:18:36

9

A. 61.

09:18:38

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Q. And what is your profession?

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A. Real estate appraiser.

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Q. Can you tell us about just briefly your

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educational background then how you got into the real  
estate appraisal business?

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A. I have an undergraduate degree in business, a  
master's degree in business, and I was a school teacher  
for 18 years, and had a background in real estate, made  
a transition and started a new career. Been an  
appraiser for 20 years. And the master's in business  
and all the real estate experience seemed to be natural  
for changing careers midlife.

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Q. And what is the nature of your business now?

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A. We're a real estate appraisal firm. We have  
commercial; we do road widening projects for the  
government, and we have a residential appraisal

09:19:29

24

09:19:34

25

09:19:39 1 department.

09:19:40 2 Q. Okay. Do you carry any certifications as an  
09:19:48 3 appraiser?

09:19:48 4 A. I'm state certified in five states: Ohio,  
09:19:51 5 Michigan, Pennsylvania, Virginia, and Florida. And I  
09:19:55 6 hold an MAI designation.

09:19:58 7 Q. What does that mean? I heard that term  
09:20:00 8 yesterday.

09:20:01 9 MR. ROBON: Your Honor, we'll stipulate to  
09:20:02 10 his qualifications.

09:20:04 11 THE COURT: That's fine.

09:20:08 12 Q. Just tell us what that means, an MAI, then I'll  
09:20:12 13 move on.

09:20:13 14 A. It's like master of appraising. It's a  
09:20:16 15 designation that's confirmed by one of three major  
09:20:20 16 organizations in the appraisal industry, and they're  
09:20:23 17 tied into the federal government through the Appraisal  
09:20:25 18 Foundation. So --

09:20:28 19 Q. And, Mr. Domini, you've been retained by Mr.  
09:20:32 20 Robon in the past?

09:20:34 21 A. Yes, I have.

09:20:36 22 Q. And you've testified in cases at his request?

09:20:43 23 A. I don't -- I've done work for him. I don't  
09:20:46 24 think anything that I've done for him has gone to court.

09:20:50 25 Q. But you've done appraisals for him?

09:20:52 1 A. Yes.

09:20:53 2 Q. Okay. So far as I know this is the first time  
09:20:58 3 you and I had ever worked together; is that right?

09:21:01 4 A. That's true.

09:21:02 5 Q. In fact, I don't think we had ever even met  
09:21:06 6 before this case?

09:21:07 7 A. That is true.

09:21:08 8 Q. Tell the jury how you got involved here.

09:21:11 9 A. Well, essentially I had met a gentleman from the  
09:21:18 10 City of Toledo in a prior case, and evidently he had  
09:21:23 11 recommended me to you, and so that kind of started the  
09:21:28 12 process and ended up doing the appraisal.

09:21:31 13 Q. And that would be Jeff Charles?

09:21:33 14 A. Yes.

09:21:36 15 Q. And at some point you were called upon to do some  
09:21:40 16 work dealing with the Cambridge Subdivision?

09:21:42 17 A. Yes. That's true.

09:21:45 18 Q. Basically to speed it up that was to come up with  
09:21:48 19 a valuation as to what the project would be -- I hate to  
09:21:53 20 use the term, what it's worth?

09:21:55 21 A. Yeah. My job was to do an appraisal of the  
09:21:58 22 remaining of the unsold lots, which I believe there were  
09:22:04 23 13 of those, and of the house that was still in  
09:22:08 24 ownership, still owned by the developer.

09:22:13 25 Q. The spec house?

09:22:14 1 A. 14 -- yeah, it was lot 15. So 14 properties in  
09:22:19 2 total.

09:22:20 3 Q. What I'd like you to do is tell us the event that  
09:22:28 4 we're trying to compare, was that the removal of trees?

09:22:34 5 A. That was the original purpose. Yeah. In fact,  
09:22:36 6 that was the purpose of my appraisal was to look at the  
09:22:41 7 value of the property before the project began, and then  
09:22:48 8 look at it again after the project.

09:22:52 9 Q. Now, with the focus being on the removal of  
09:22:58 10 trees, did you in any way concern yourself with whether  
09:23:00 11 those trees were on Cambridge property or railroad  
09:23:05 12 property?

09:23:06 13 A. At first I tried to figure it out and -- but  
09:23:11 14 ultimately I wasn't able to do that. I just figured  
09:23:16 15 this is the job of the engineers and other people, not  
09:23:19 16 me.

09:23:19 17 Q. All right. And so it's possible to have a  
09:23:25 18 reduction in value of real estate even if the tree is  
09:23:28 19 removed on the neighbor's property; is that correct?

09:23:32 20 A. It sure is.

09:23:33 21 Q. So without -- I'm not going to ask any question  
09:23:37 22 about whose trees these were, but just tell us, what did  
09:23:41 23 you do, how did you do it, and what conclusions you  
09:23:44 24 reached.

09:23:45 25 A. Well, what I did, I appraised the whole property

09:23:52 1 as it sat so of the date -- the official date that we  
09:23:58 2 used for the project was June 1, I believe, of '06. So  
09:24:06 3 basically went through a process to do that appraisal.  
09:24:12 4 I can run through -- would you like me just to kind of  
09:24:15 5 run through it?

09:24:16 6 Q. You can feel free to refer to your note, your  
09:24:19 7 materials, or whatever materials you need.

09:24:25 8 A. All right. The first thing I did was studied  
09:24:33 9 other subdivisions that had similar characteristics.  
09:24:38 10 Four out of the five subdivisions that I studied were  
09:24:41 11 backing to railroads. Three of them were in the  
09:24:45 12 Perrysburg schools, and two of them in Rossford schools.

09:24:50 13 Q. And how is that relevant when you mention the  
09:24:53 14 schools?

09:24:53 15 A. Well, I just wanted to get, since the subject is  
09:24:58 16 in Rossford schools, I wanted to get a view of the sales  
09:25:01 17 activity in the Perrysburg schools and the sales  
09:25:04 18 activity in the Rossford schools where the subject is  
09:25:07 19 just so I'd have a basis for comparison.

09:25:10 20 Q. All right. And so then how did it proceed?

09:25:14 21 A. Well, some of these subdivisions had sold out a  
09:25:20 22 while ago, but the first one I looked at was  
09:25:25 23 Valleybrook, which was platted in 1988 and sold out in  
09:25:30 24 1996. And they sold about 15 lots a year there, and  
09:25:37 25 many of which were on the railroad tracks. And so



09:25:41 1 we'll get into that in a minute. But Belmont Meadows,  
09:25:46 2 which is -- which is essentially the south side of Ford  
09:25:52 3 Road, and this is also in Perrysburg school, has the  
09:25:55 4 turnpike behind it and the railroad basically very near  
09:26:02 5 to the subdivision. And it sold -- it sold out in two  
09:26:09 6 years in 1996 and 1997; they sold 31 lots, some of which  
09:26:15 7 were backing to the turnpike and backing to the railroad  
09:26:18 8 tracks, and they sold 31 lots in two years.

09:26:21 9 Q. Back in the timeframe of those two subdivisions  
09:26:24 10 you've mentioned, how was the housing market in general?

09:26:27 11 A. I traced the housing market back to 2000, and I  
09:26:35 12 believe that the market was still pretty solid. It was  
09:26:41 13 very solid back in the mid to late '90s, but I do have  
09:26:47 14 the figures here for the market, 2000 on through to  
09:26:56 15 2007. In Wood County house sales --

09:27:00 16 Q. We'll get to that in a minute. But those two  
09:27:02 17 subdivisions you just mentioned were in the mid to late  
09:27:06 18 '90s, I think you said?

09:27:06 19 A. Right. I'd say sales in that period of time were  
09:27:10 20 good. They were strong.

09:27:11 21 Q. Go ahead. I had interrupted you, Bob.

09:27:13 22 A. The other was a subdivision out on Eckle Junction  
09:27:18 23 Road, Fort Meigs Road. Not really near the subject  
09:27:24 24 property, but we chose it because it was on the railroad  
09:27:26 25 tracks. And it sold 1994 to 2002, and they sold nine

09:27:33 1 lots a year in that one, many of which were on the  
09:27:36 2 railroad tracks.

09:27:39 3 Creek Bend Farms is very near to the -- near to  
09:27:43 4 our property.

09:27:46 5 Q. When you say "our property" --

09:27:47 6 A. This subject property. And it's off of Bates  
09:27:51 7 Road, and it's on the railroad tracks, and many of those  
09:27:56 8 lots have a clear view of the railroad tracks. We have  
09:28:01 9 pictures of it in my appraisal. It sold 1999 to 2006,  
09:28:07 10 still has few lots available today, and are selling at  
09:28:15 11 about two lots a year.

09:28:17 12 And then I looked at Belmont Woods. It's not on  
09:28:21 13 the railroad tracks, but it's a good example of a  
09:28:25 14 subdivision that's very -- it's high end. It's near to  
09:28:30 15 the subject property. And so I wanted to have a look  
09:28:35 16 that one.

09:28:35 17 Q. But it's not on the tracks?

09:28:37 18 A. It's not really on the tracks at all, no.

09:28:42 19 Q. What was the other one you mentioned?

09:28:46 20 A. Creek Bend Farms is on the railroad track, yes.

09:28:48 21 Q. What's the price range of homes over there,  
09:28:51 22 though, compared to what they intended in Cambridge?

09:28:54 23 A. I drove through there yesterday and looked at  
09:28:59 24 those homes. Didn't go check to see what the prices  
09:29:03 25 were, but I would say those houses would be more two-car

09:29:06 1 garage, not the bigger homes that you see and like the  
09:29:10 2 ones that had been built in the subject subdivision and  
09:29:14 3 in Belmont Woods. I'd say more in the range of  
09:29:18 4 \$200,000 to \$250,000.

09:29:19 5 Q. So different market entirely?

09:29:20 6 A. It's a little bit lower price market, yes.

09:29:24 7 Q. Once again, I interrupted you.

09:29:25 8 A. Belmont Woods is what I talked about that is a  
09:29:31 9 sold out subdivision. They built a pond; they are  
09:29:35 10 surrounded by trees. It's a very secluded kind of  
09:29:39 11 rolling subdivision. Very nice homes. And it sold  
09:29:44 12 out 1991 through 1999 and at 3 and a half lots a year.  
09:29:53 13 So it had a pretty good sales record, but not nearly as  
09:29:56 14 good as some of those in Perrysburg that we talked about  
09:30:00 15 earlier.

09:30:02 16 Q. And gathering all that data that you just talked  
09:30:06 17 about, what else did you need to do, if anything, to  
09:30:08 18 reach your conclusions as to values?

09:30:12 19 A. I wanted to see what the effect was of the  
09:30:17 20 railroad and highway influence, and so I selected  
09:30:24 21 certain home sales in Valleybrook, Belmont Meadows,  
09:30:31 22 Creek Bend Farms, and Indian Meadows, all four of which  
09:30:35 23 were on the tracks of lots that sold on the tracks, lots  
09:30:42 24 that sold in those same subdivisions that were not on  
09:30:45 25 the tracks, and just to see where they fell.

09:30:49 1 And so first of all, Valleybrook had an average  
09:30:54 2 on four lots that I looked at that were on the railroad  
09:30:59 3 tracks, had an average selling price of \$36,900. The  
09:31:08 4 lots that I looked at that were not on the railroad  
09:31:11 5 tracks had a selling price of \$38,000. So essentially a  
09:31:16 6 pretty small difference, about three percent.

09:31:19 7 And then Belmont Meadows, there was about an  
09:31:23 8 eight percent difference comparing lots on the railroad,  
09:31:28 9 lots not on the railroad. And some of the lots in  
09:31:32 10 Belmont Meadows had the turnpike behind them as well.

09:31:38 11 Creek Bend Farms was the biggest difference.  
09:31:42 12 Some of those lots are completely open to tracks today.  
09:31:45 13 You can drive there and see them. And there was about  
09:31:51 14 a 24 percent difference there between the lots that were  
09:31:55 15 on the tracks and those that were not.

09:32:01 16 Indian Meadows is the one off of Eckle Junction,  
09:32:05 17 Fort Meigs Road area, had a 17 percent difference.

09:32:09 18 So we've got a pretty big difference of upwards  
09:32:12 19 to 20 to 25 percent was the result of our study that we  
09:32:16 20 conducted. That's why we picked those subdivisions to  
09:32:20 21 begin with, because they were all on railroad tracks.

09:32:22 22 Q. And the difference, I'm assuming the ones that  
09:32:25 23 abut the railroad were selling for less than the ones  
09:32:28 24 not abutting?

09:32:29 25 A. It's about 20, 25 percent difference.

09:32:32 1 Q. I just needed you to say difference which way?

09:32:35 2 A. Yes. The ones on the railroad tracks were  
09:32:37 3 selling for about 25 percent less.

09:32:41 4 Q. Okay. What else did you do in order to reach  
09:32:45 5 your conclusions?

09:32:55 6 A. Well, the first thing is to look at the prices of  
09:32:59 7 lots and determine what the selling price of your  
09:33:08 8 property should be.

09:33:14 9 Q. Not my property, Bob.

09:33:17 10 A. Of the property you are appraising, your subject  
09:33:21 11 property, yes, it is. So looking at all the data from  
09:33:27 12 these various subdivisions, you -- and looking at the  
09:33:35 13 sales history of the subject property, you make that  
09:33:39 14 determination.

09:33:40 15 And I determined that the non-railroad frontage  
09:33:45 16 lots of our subdivision had -- should be sold at  
09:33:50 17 \$60,000, and the lots that are on the railroad tracks at  
09:33:55 18 \$48,000. So that is about a 28 percent discount, as  
09:34:03 19 the data had indicated.

09:34:06 20 Q. Before you began your task or in the early stages  
09:34:09 21 of it, did we make a number of materials available to  
09:34:12 22 you?

09:34:12 23 A. Well, yes. I mean, we -- I'm not sure that --

09:34:18 24 Q. Well, for example, you had the Peterman survey?

09:34:21 25 A. You did give me the Peterman survey that

09:34:23 1 indicated that shaded areas were --

09:34:26 2 Q. They call that "disturbed area"?

09:34:29 3 A. Where allegedly trees had been removed. So yes,  
09:34:33 4 I had a copy of that.

09:34:34 5 Q. So you were able to have an understanding as to  
09:34:37 6 what the changes were, how much vegetation was removed  
09:34:40 7 and so forth?

09:34:41 8 A. Yes.

09:34:42 9 Q. Okay. The numbers that you just gave us on the  
09:34:48 10 lot prices, was that before or after the tree removal?

09:34:50 11 A. That value would be before.

09:34:59 12 Q. Okay. Did you come up with a total then using  
09:35:03 13 the calculations that you made as far as the total value  
09:35:06 14 for the underdeveloped -- that's the wrong word -- the  
09:35:10 15 unsold lots?

09:35:11 16 A. Well, yeah. I mean, you add all the 14 -- 13  
09:35:20 17 lots, you would get \$708,000. So that's a total. But  
09:35:29 18 you can't sell all of those lots in one year. If you  
09:35:31 19 could sell those lots all right now, well, then you  
09:35:35 20 could say, sure, the value is \$708,000. But you can't  
09:35:38 21 do that. So you have to sell them off over time. And  
09:35:41 22 so you have to do a scenario and take each year, you're  
09:35:46 23 going to sell so many lots, and bring those cash flows  
09:35:50 24 back to present value. And you have to take into  
09:35:54 25 account the time that it takes you to sell those

09:35:56 1 properties.

09:35:57 2 Q. You just mentioned present value. And maybe the  
09:36:01 3 jury already understands that concept. But just take a  
09:36:05 4 minute and tell us, what does it mean to reduce a number  
09:36:08 5 to present value?

09:36:09 6 A. Well, it's like a dollar a year from now isn't  
09:36:14 7 worth the same as a dollar today. And so a dollar a  
09:36:20 8 year from now has to be discounted. And that's what we  
09:36:23 9 do. So if you're going to sell a property and make  
09:36:26 10 sales next year, the year after, the year after, then  
09:36:30 11 you apply a discount factor to those annual cash flows,  
09:36:37 12 and you essentially -- you reduce them; you reduce the  
09:36:42 13 amount that the present worth is.

09:36:46 14 Q. So similar to if I win a \$10 million lottery and  
09:36:49 15 take the cash option, they're not going to give me  
09:36:52 16 \$10 million. They'll give me some other number that's  
09:36:55 17 less. Is that reduction to present value?

09:36:58 18 A. Exactly. I mean, if the plan is that you get X  
09:37:03 19 amount of dollars, say, each year for five years, or  
09:37:09 20 would you like it all right now, you're not going to get  
09:37:11 21 the whole thing right now.

09:37:13 22 Q. Okay. So did you apply that concept, that -- and  
09:37:17 23 by the way, is that an accepted technique to use in  
09:37:21 24 valuing?

09:37:22 25 A. Yes, that is a very commonly used technique in

09:37:27 1 appraising.

09:37:28 2 Q. And using that and whatever other information you  
09:37:34 3 had, what value did you come up with for the unsold lots  
09:37:39 4 in Cambridge prior to the tree removal?

09:37:43 5 A. Well, I also included the sale of the house.

09:37:49 6 Q. Oh.

09:37:50 7 A. We appraised -- I had the residential people who  
09:37:56 8 pay rent to me in my office, hired them to do the house  
09:38:00 9 appraisal.

09:38:01 10 Q. On lot 15?

09:38:03 11 A. On lot 15. So we included -- I included that in  
09:38:07 12 the annual cash flows. And I made the assumption that  
09:38:11 13 that house would sell for \$310,000, and that it would  
09:38:17 14 sell in the first year. And I also, based on my  
09:38:22 15 research, determined -- and based on the subject's own  
09:38:26 16 performance, and that's something we haven't talked  
09:38:29 17 about yet is the sales history of the subject property,  
09:38:34 18 but that was something that was very important in my  
09:38:40 19 determining at what rate of sales I could expect for the  
09:38:44 20 subject property. Once I made that determination, I  
09:38:51 21 made the decision that the subject property would have  
09:38:56 22 sales of two lots per year for, I believe, the first  
09:39:01 23 five years, and then the sixth year would sell three  
09:39:05 24 lots. The first year would sell two lots plus the  
09:39:09 25 house.



09:39:10 1 Q. Okay. And did the sales data in the couple years  
09:39:17 2 leading up to the date the trees were removed support  
09:39:21 3 two lots per year?

09:39:22 4 A. The subject for the period of 2001 through June  
09:39:28 5 of 2006 was selling lots at the rate of 1.7 lots per  
09:39:34 6 year. I believe there were eight or nine sales. And  
09:39:40 7 what is that, about five years, and it's just under two  
09:39:48 8 lots per year that had been -- that's the subject's  
09:39:51 9 history. The last sale of a lot for the subject  
09:39:55 10 property was in January of 2004. So there was a two  
09:40:01 11 and a half year period between the last date that any  
09:40:07 12 lot had sold in the subdivision and the date the project  
09:40:11 13 came through in June of '06. So I had to look at that,  
09:40:18 14 the sales, basically. Then I looked at the sales in  
09:40:21 15 the township and in Lucas County as to what the level of  
09:40:28 16 sales had been during the years that we had no sales.  
09:40:31 17 And all through '04, '05, and half of '06, and those  
09:40:37 18 were very strong years in Perrysburg Township and Wood  
09:40:40 19 County, very strong sales years.

09:40:45 20 THE COURT: When you say no lots had sold  
09:40:47 21 since January of '04, we're referring to  
09:40:50 22 Old-Granite-owned lots?

09:40:51 23 THE WITNESS: Yes.

09:40:52 24 Q. And the other thing, on figuring out the -- I  
09:40:57 25 forget the technical term, how many houses are going to

09:41:00 1 be or lots are going to be sold per year.

09:41:02 2 A. Absorption.

09:41:04 3 Q. Figuring out the absorption rate, would it be  
09:41:07 4 true that the faster I assume they are absorbed, the  
09:41:12 5 higher my value that I come up with would be?

09:41:15 6 A. Absolutely.

09:41:17 7 Q. So if we were to say they're going to sell these  
09:41:21 8 things at five lots per year, we'd come up with an even  
09:41:25 9 higher value?

09:41:26 10 MR. ROBON: Objection.

09:41:27 11 A. Your value would be higher.

09:41:28 12 Q. And you're using two --

09:41:30 13 MR. ROBON: I made an objection, Your Honor.  
09:41:33 14 Every question is yes or no.

09:41:35 15 THE COURT: Every question is what?

09:41:37 16 MR. ROBON: Requires a yes or no answer.  
09:41:39 17 He's leading the witness.

09:41:41 18 THE COURT: Well there's two different  
09:41:43 19 points you're making.

09:41:51 20 There is a little leading. The last answer  
09:41:54 21 may stand, however.

09:41:55 22 MR. BAHRET: Thank you, Your Honor.

09:41:57 23 BY MR. BAHRET:

09:41:58 24 Q. Bob, were there any other major concerns for you?  
09:42:01 25 I just want to shorten it up and get to your

09:42:04 1 conclusions, if we could. If there's anything major  
09:42:07 2 you feel you need to explain to the jury as to how you  
09:42:10 3 got there and why you think your numbers are to be  
09:42:12 4 supported, I'll give you a chance. Just walk us  
09:42:17 5 through in short form; speed it up, in other words.  
09:42:20 6 Tell us your conclusions.

09:42:25 7 A. Well, my conclusions were that you would sell two  
09:42:29 8 lots per year, you'd sell the house and two lots per  
09:42:33 9 year for five years. The sixth year you would sell  
09:42:37 10 three lots. And that you would sell the non-railroad  
09:42:44 11 fronting lots for \$60,000, the railroad fronting lots  
09:42:47 12 for \$48,000, that you would not have any increase in  
09:42:53 13 prices during the sell-out period, that they would be  
09:42:57 14 flat. And I base that on history, and Belmont Meadows  
09:43:03 15 had steadily declining -- Belmont Woods, I'm sorry, that  
09:43:07 16 had steadily declining sale prices.

09:43:09 17 And the only other factor is the discount rate  
09:43:13 18 that you use, and that I took out of a national  
09:43:17 19 publication. And that's basically the factor that  
09:43:20 20 takes the annual cash flows and converts them to present  
09:43:25 21 worth. So those were my major assumptions.

09:43:29 22 Q. Okay. And using those assumptions, what value  
09:43:32 23 did you put on the unsold property in Cambridge prior to  
09:43:40 24 the tree removal?

09:43:43 25 A. Including the house, \$606,850.

09:43:53 1 Q. And then after you factored in the tree removal,  
09:43:57 2 did you come up with another number?

09:44:01 3 A. When I looked at the drawing that Peterman had  
09:44:04 4 done, and it showed, I think, maybe three of the lots --  
09:44:11 5 three or four of the lots were affected by the tree  
09:44:15 6 removal, and it was -- I scaled it off; it was about an  
09:44:20 7 eight-foot wide section of trees that, according to  
09:44:23 8 Peterman's sketch, had been removed. What I did was  
09:44:29 9 just estimate what it would cost to replace those trees.

09:44:34 10 Q. Okay.

09:44:34 11 A. So I figured river birch or other tall trees you  
09:44:41 12 can buy 20, 25 foot tall trees, have them installed for  
09:44:45 13 \$400, \$450. How many trees would it take to fill in  
09:44:49 14 that whole area? And I think I calculated \$20,000  
09:44:54 15 dollars.

09:44:54 16 Q. So what value did you come up with for the land,  
09:44:58 17 the same --

09:45:00 18 A. Essentially I just subtracted \$20,000 of what I  
09:45:04 19 thought it would cost to replace the foliage that  
09:45:07 20 allegedly had been taken out. And so that -- it was,  
09:45:11 21 like, \$586,000.

09:45:17 22 Q. So a \$20,000 difference?

09:45:19 23 A. Yes.

09:45:19 24 Q. Now, did there come a time when I asked you to  
09:45:22 25 direct some attention to claims of ponding?

09:45:26 1 A. Yes, you did.

09:45:28 2 Q. And did you analyze that issue?

09:45:30 3 A. I did. I wasn't able to come up with any  
09:45:36 4 rational method for calculating the value based upon  
09:45:43 5 occasional ponding at the back of a property. And I  
09:45:52 6 believe I just, for the lack of any rationale that I  
09:45:57 7 could come up with, I didn't think that there was any  
09:46:02 8 difference that I could measure as a result of that  
09:46:07 9 factor.

09:46:08 10 Q. Did you, in fact, go back to the property site  
09:46:12 11 when asked that question?

09:46:16 12 A. I did. I went back; I went through the property  
09:46:19 13 again. I took some pictures of the backyard. There  
09:46:22 14 was a little bit of water. It was a very rainy time of  
09:46:25 15 year. It was the very end of April, first of May at  
09:46:28 16 the time. I think I gave you the pictures earlier  
09:46:31 17 today. But there was some water in the very back of  
09:46:37 18 the house that Mike McCarthy lived in.

09:46:40 19 Q. Did you have occasion to speak with Mr. McCarthy?

09:46:43 20 A. Yeah. He -- he's the one who allowed me to have  
09:46:47 21 a look at it.

09:46:51 22 Q. And my understanding is that Mr. McCarthy gave  
09:47:03 23 you a copy of a picture he took back in 2006?

09:47:07 24 A. He did, yes.

09:47:08 25 Q. For the jury, that's the same picture that has

09:47:11 1 been marked as Exhibit 37. And then you took a couple  
09:47:14 2 of photos?

09:47:19 3 A. The rest are photos I took. The rest is taken  
09:47:24 4 at lot 16; it shows some water at the very rear of lot  
09:47:30 5 16 which is owned by Todd Berman, not part of my  
09:47:34 6 appraisal.

09:47:35 7 MR. BAHRET: This isn't yet marked as an  
09:47:37 8 exhibit, but if counsel wants we can mark them.

09:47:40 9 MR. ROBON: I want you to mark it.

09:47:42 10 MR. BAHRET: Okay.

09:47:44 11 MR. ROBON: Why didn't you provide these to  
09:47:46 12 me previously?

09:47:47 13 THE COURT: Gentlemen we'll have those  
09:47:49 14 discussions, please, at the bench. Otherwise, mark IT  
09:47:51 15 before you discuss it so the record is clear or don't  
09:47:54 16 use it.

09:48:20 17 For some reason this wasn't done before we  
09:48:22 18 began testimony today.

09:48:24 19 MR. BAHRET: Unfortunately I first saw these  
09:48:27 20 photographs half an hour ago.

09:48:29 21 THE COURT: Not an excuse.

09:48:29 22 BY MR. BAHRET:

09:48:36 23 Q. I don't need to mark them. I'll have you  
09:48:39 24 describe. What did you see?

09:48:43 25 A. Essentially there's about maybe an eight- to

09:48:49 1 ten-foot wide section of water at the very rear of Mike  
09:48:57 2 McCarthy's property, the property of the house he's  
09:49:01 3 LIVING IN. And there was, I think, a very small amount  
09:49:04 4 on Berman's lot next door, five or ten feet, a small  
09:49:12 5 puddle back there.

09:49:13 6 Q. Did you get information from Mr. McCarthy about  
09:49:17 7 how often this sort of thing happens or how long it  
09:49:20 8 lasts? I'm not asking you to repeat what he said; just,  
09:49:31 9 did you get information from him?

09:49:32 10 A. He talked about it, yes.

09:49:34 11 Q. And using that information, did you -- was that  
09:49:53 12 in your thought process as you were trying to determine  
09:49:53 13 whether these temporary water issues affected the value?

09:49:54 14 A. I believe there are periods of time during a  
09:49:57 15 given year, especially during heavy rains, where there  
09:50:02 16 was -- it was evident there was some water back there  
09:50:07 17 that day; I could see that. There is some water that  
09:50:13 18 collects at the rear of his property, the property of  
09:50:16 19 the house where he lives. So yes, I mean, I believe it  
09:50:20 20 does happen, yes.

09:50:24 21 Q. With the ponding issue there, would you have the  
09:50:26 22 same value for the house that you had in your original  
09:50:29 23 calculation?

09:50:33 24 A. My main problem is I didn't have any rationale  
09:50:37 25 for --

09:50:38 1 THE COURT: Is the answer yes to the  
09:50:41 2 question?

09:50:41 3 THE WITNESS: Could you repeat the question?

09:50:42 4 THE COURT: Thank you.

09:50:43 5 BY MR. BAHRET:

09:50:43 6 Q. When you directed your attention to the ponding  
09:50:45 7 issue, did you come up with any different value for the  
09:50:48 8 house than you had come up with before you --

09:50:53 9 A. No.

09:50:54 10 MR. BAHRET: Thank you. I have no other  
09:50:55 11 questions presently.

09:50:58 12 THE COURT: Cross?

09:51:00 13 - - -

09:51:00 14 ROBERT DOMINI, CROSS-EXAMINATION

09:51:45 15 BY MR. ROBON:

09:51:45 16 Q. Mr. Domini, you and I know each other, correct?

09:51:48 17 A. Yes, sir.

09:51:49 18 Q. And you know that trees will not live in ponds,  
09:51:59 19 correct? Or don't you know that?

09:52:02 20 A. No, if there's standing water, yes, trees will  
09:52:08 21 not live.

09:52:09 22 Q. If you lived in Mike McCarthy's house, wouldn't  
09:52:13 23 you want to plant pine trees or build up a mound and try  
09:52:18 24 and screen out the railroad track?

09:52:22 25 A. I would.



09:52:26 1 Q. And wouldn't it be fruitless to plant trees where  
09:52:33 2 there's water if they're going to dye?

09:52:40 3 A. Yeah. I mean, I wouldn't --

09:52:44 4 Q. Well, how can you possibly say to this jury that  
09:52:47 5 there's no devaluation because the property floods?  
09:52:51 6 That doesn't make any sense?

09:52:52 7 A. I just said -- what I told Mr. Bahret is I  
09:52:56 8 didn't -- I couldn't come up with any measurable  
09:52:59 9 rationale for the occasional ponding, the occasional  
09:53:04 10 water that occurs during rainy season at the very back  
09:53:09 11 of that lot.

09:53:14 12 Q. Would you tell the jury what you valued the lots  
09:53:18 13 at before the cutting of the trees?

09:53:21 14 A. \$60,000, and \$48,000.

09:53:24 15 Q. Total for all the lots?

09:53:27 16 A. \$708,000.

09:53:30 17 Q. \$708,000. And what did you value the trees  
09:53:35 18 after?

09:53:35 19 A. The trees, \$20,000.

09:53:37 20 Q. Not the trees, I mean the lots after the trees  
09:53:40 21 were cut.

09:53:41 22 A. The entire process, the after was just -- the  
09:53:44 23 only difference I had was the cost to replace the trees,  
09:53:48 24 \$20,000.

09:53:49 25 Q. So I would just subtract \$20,000, correct?

09:53:57 1 A. Well the \$708,000 is the gross amount. That  
09:54:01 2 doesn't take into account the whole discounted cash  
09:54:04 3 flow, et cetera. That's okay. But the difference is  
09:54:07 4 the \$20,000, yes.

09:54:08 5 Q. So all I need to do is put up \$20,000 damage,  
09:54:15 6 right?

09:54:16 7 A. To replace the eight-foot wide strip of trees.

09:54:21 8 Q. Now, did you consult an arborist to give you a  
09:54:26 9 price quotation on planting trees or brush or brambles?

09:54:32 10 A. Yes.

09:54:32 11 Q. You did?

09:54:33 12 A. Yes.

09:54:33 13 Q. And who was that?

09:54:34 14 A. Bosgrove (phonetically).

09:54:37 15 Q. And did he give you information where you came up  
09:54:40 16 with this \$20,000?

09:54:41 17 A. I know that he can plant the tree that I  
09:54:44 18 mentioned in my report for \$400, \$450.

09:54:49 19 Q. And how many trees were you going to plant?

09:54:52 20 A. I don't recall now.

09:54:54 21 Q. And how big were the trees going to be?

09:54:56 22 A. They were going to be 15, 20 feet tall.

09:54:59 23 Q. 15, 20 feet tall?

09:55:01 24 A. And they were about ten foot wide.

09:55:06 25 Q. And you don't recall how many, but he was going

09:55:09 1 to do it for?

09:55:10 2 A. Well, if it's \$20,000 and it's \$400 a tree,  
09:55:14 3 that's -- isn't that 50?

09:55:16 4 Q. That's 50 trees?

09:55:18 5 A. Fifty trees.

09:55:19 6 Q. And he's going to plant 15-foot tall --

09:55:22 7 A. 15 to 20.

09:55:24 8 Q. Norway?

09:55:25 9 A. No, river birch was the one that I -- I'm sure  
09:55:29 10 there are other trees that would be equally as  
09:55:33 11 attractive. That's the one I personally have used that  
09:55:35 12 I find is -- it's a good tall tree, and it's nice and  
09:55:41 13 wide; it will spread out. You can get them 12 foot  
09:55:46 14 wide, maybe a little wider. And when they fill out in  
09:55:50 15 season, they provide a good screening.

09:55:53 16 Q. And is it an evergreen?

09:55:55 17 A. No, it isn't. But there weren't -- never mind.

09:55:59 18 Q. Well, 12 feet, if I take, one, two, three,  
09:56:13 19 four -- are you telling this jury that the trees that  
09:56:16 20 are quoted on that are from my hand to the end of the  
09:56:21 21 jury box wide now, when they would be planted?

09:56:24 22 A. The river birch that you would plant are -- I  
09:56:27 23 didn't say necessarily 12. Ten to 12, but they're a  
09:56:31 24 good ten-foot wide, yes.

09:56:34 25 Q. Now?

09:56:35 1 A. The ones that you can get that are about 15 to 20  
09:56:38 2 feet tall.

09:56:45 3 Q. Are you aware we had an arborist here yesterday  
09:56:48 4 who said it would take, I think, \$135,000 --

09:56:52 5 MR. BAHRET: Objection.

09:56:55 6 THE COURT: Overruled.

09:56:58 7 Q. -- to not only replace what was taken out, but  
09:57:03 8 that he couldn't do it without bringing in substantial  
09:57:07 9 amounts of topsoil to raise the grade so that there  
09:57:12 10 would be no flooding and the trees wouldn't die? That  
09:57:17 11 seems like it's about seven or eight times as much as  
09:57:20 12 what you're suggesting.

09:57:23 13 THE COURT: Is that a question?

09:57:27 14 MR. ROBON: Yes.

09:57:28 15 MR. BAHRET: It didn't sound like a question  
09:57:29 16 to me.

09:57:32 17 BY MR. ROBON:

09:57:33 18 Q. Isn't that seven or eight times as much?

09:57:35 19 A. That would be about seven times, yes.

09:57:38 20 Q. Did you put any value on the nine trees that were  
09:57:45 21 actually cut down as shown on the survey?

09:57:50 22 A. I --

09:57:54 23 Q. Yes or no?

09:57:55 24 A. No.

09:58:21 25 Q. You've got no dollars for flooding, correct? No

09:58:30 1 dollars in reduction in value of the house?

09:58:33 2 A. Correct.

09:58:55 3 Q. And were you aware that these lots that initially  
09:58:59 4 sold in the subdivision sold for as high as \$145,000?

09:59:08 5 A. Yes, I'm very aware of that. Lot 16, and I  
09:59:13 6 believe it was lot 17 sold for \$140,000 and \$145,000 to  
09:59:18 7 builders.

09:59:21 8 Q. And so you're telling this jury that lot 16 and  
09:59:36 9 lot 17 sold for \$140,000 and \$145,000. Lot 15 is next  
09:59:42 10 to it. And you're telling the jury that that's only  
09:59:44 11 worth \$48,000, correct? A third?

09:59:51 12 A. Can I explain?

09:59:52 13 Q. Yes.

09:59:53 14 A. Well, those lots were sold to two builders in  
09:59:58 15 2001, in October and November of 2001. Both of them to  
10:00:04 16 this day still own those lots. They bought those lots  
10:00:08 17 in anticipation of building homes via building  
10:00:12 18 contracts, and they have each sat on those lots for  
10:00:16 19 seven long years without a building contract. So those  
10:00:22 20 are vacant lots today. Todd Berman, lot 16, had to  
10:00:28 21 enter a lottery to get that lot, which was generally  
10:00:31 22 regarded as the best lot in the subdivision --

10:00:35 23 Q. Right.

10:00:36 24 A. -- and got no building contract in seven years.

10:00:39 25 Q. But the question is, he was one -- he's one of

10:00:42 1 the premier builders in northwest Ohio?

10:00:46 2 A. He is an excellent builder. So is Todd  
10:00:49 3 Huffman -- I'm sorry, Eric Huffman, and both of them  
10:00:54 4 have their signs out front, and both of them have sat on  
10:00:57 5 those for seven years with no building contract.

10:01:00 6 Q. But when I see that you go from \$145,000 down to  
10:01:11 7 \$48,000, that's a difference of \$97,000. I just have a  
10:01:23 8 tough time -- I can see why it's only worth \$48,000 now  
10:01:28 9 because the trees are cut down, but you're telling the  
10:01:32 10 jury that --

10:01:33 11 MR. BAHRET: Your Honor, this isn't even a  
10:01:34 12 question. He's in closing argument.

10:01:37 13 MR. ROBON: I'll rephrase it.

10:01:38 14 THE COURT: Thank you. The jury will  
10:01:40 15 disregard the interrupted question. Counsel will start  
10:01:43 16 over.

10:01:44 17 BY MR. ROBON:

10:01:44 18 Q. How many lots do you believe were affected by  
10:01:48 19 tree cutting?

10:01:53 20 A. I believe it was three or four.

10:02:01 21 Q. All right. Let's say it's four, lots 12 through  
10:02:04 22 15. Can you agree with that?

10:02:29 23 A. That is correct.

10:02:31 24 Q. So if you got four lots, and you're saying the  
10:02:35 25 total damage was \$20,000, that's \$5,000 per lot,

10:02:41 1 correct?

10:02:43 2 A. That's what I estimate it would cost to replace  
10:02:46 3 the trees.

10:02:48 4 Q. Now, how tall do you believe the brambles and the  
10:02:53 5 trees were before they were cut down? Do you have any  
10:02:58 6 idea?

10:02:59 7 A. Well, I used to have some of those brambles in my  
10:03:03 8 backyard until they were cut down. But --

10:03:07 9 Q. Tell the jury how upset you and your wife were  
10:03:11 10 when the county came by and cut the trees down in the  
10:03:16 11 crick bank behind your house.

10:03:18 12 A. As you well know, Mr. Robon, that's not a good  
10:03:23 13 thing, and you're not happy about that.

10:03:26 14 Q. Right. In fact, it exposed an apartment  
10:03:31 15 building that was on the other side of the creek of your  
10:03:33 16 house, didn't it?

10:03:34 17 A. Yes.

10:03:35 18 Q. And you and your wife were livid. And you  
10:03:40 19 thought it damaged your property, right?

10:03:46 20 A. Well, let's just say you're absolutely right, I  
10:03:49 21 wasn't happy.

10:04:01 22 You were asking me about how tall they are.

10:04:12 23 MR. ROBON: I don't have any further  
10:04:14 24 questions.

10:04:18 25 - - -

10:04:18 1 ROBERT DOMINI, REDIRECT EXAMINATION

10:04:19 2 BY MR. BAHRET:

10:04:19 3 Q. How tall are they?

10:04:21 4 A. When I was saying I had them in my backyard,  
10:04:24 5 those are about usually 15, 20 feet tall, those  
10:04:31 6 brambles. Occasionally you'll get a tree in there that  
10:04:33 7 will be taller. But the brambles themselves get 15, 20  
10:04:38 8 feet tall.

10:04:39 9 Q. And where were these things located with  
10:04:41 10 reference to your house?

10:04:43 11 A. They were in a creek. And many of them were on  
10:04:47 12 the other side of the creek on the Dominion side. But  
10:04:50 13 the county, to clean the ditch, had to chop them all  
10:04:54 14 down.

10:04:54 15 Q. Okay. So there's no action that you could take  
10:04:58 16 since they're not in your yard?

10:04:59 17 A. No. The county had the right to do that.

10:05:03 18 Q. You were asked about the sales. Did you study  
10:05:07 19 the sales activity and compare prices in Cambridge, sir?

10:05:12 20 A. Yes, I did. We were talking about the pricing of  
10:05:20 21 the lot as compared to what Berman and Huffman had paid  
10:05:24 22 in 2001, and that's when I was about to say, well, if  
10:05:32 23 you look at the sales history of the subject property,  
10:05:36 24 the sales started at \$140,000; they went to \$145,000,  
10:05:43 25 and they declined all through the years until the last



10:05:46 1 sale was in January of 2004 at \$90,000. So they started  
10:05:52 2 at 140, went to 145, and went down to 90. And it was a  
10:06:00 3 steady projection downward in that period of five years.

10:06:07 4 Q. Mr. Domini, do you know, is it common as  
10:06:10 5 subdivisions are in existence the longer they go, the  
10:06:13 6 prices generally go down or up or stay the same, or  
10:06:16 7 what?

10:06:16 8 A. They usually go up. And, in fact, when a  
10:06:19 9 subdivision is nearing completion, usually there's a big  
10:06:23 10 increase in the prices.

10:06:26 11 Q. But not -- that has not been evident with  
10:06:29 12 Cambridge?

10:06:29 13 A. Cambridge did not have a single lot sell between  
10:06:33 14 January of '04 and June of '06. Not one during  
10:06:39 15 excellent years. And so the prices steadily declined  
10:06:42 16 for five years, and then they stopped dead in January of  
10:06:47 17 '04.

10:06:49 18 Q. And just to explain, I'm sure I'll hear about  
10:06:53 19 this later in closing, the \$708,000 number that you gave  
10:06:58 20 us is before reducing to present value?

10:07:00 21 A. Exactly. That -- and it doesn't include the  
10:07:05 22 house. But that's just the gross pricing of the lots  
10:07:10 23 before you take into account the time value of money and  
10:07:15 24 the selling expenses of marketing and so forth and  
10:07:19 25 property taxes that occur during the sell out period.

10:07:22 1 And you're only going to sell two lots a year, so it  
10:07:25 2 will be in six years, sell all those lots at these  
10:07:29 3 prices.

10:07:30 4 Q. And, Bob, did you have occasion to speak with  
10:07:32 5 Huffman or Berman or Bill Schoen, any of those three?

10:07:36 6 A. I spoke to Huffman and Berman. Did not speak to  
10:07:42 7 Bill.

10:07:42 8 Q. Are they pleased with this development?

10:07:44 9 MR. ROBON: Objection.

10:07:45 10 THE COURT: Sustained.

10:07:47 11 MR. BAHRET: No other questions.

10:07:52 12 - - -

10:07:52 13 ROBERT DOMINI, RECROSS-EXAMINATION

10:07:53 14 BY MR. ROBON:

10:07:53 15 Q. Mr. Domini, when you discounted the \$708,000,  
10:07:58 16 could you tell the jury what number you discounted it  
10:08:02 17 to?

10:08:02 18 A. Not only did I --

10:08:04 19 Q. This is before the trees were cut, right?

10:08:07 20 A. Right.

10:08:07 21 Q. And how much was that?

10:08:08 22 A. Well, it also included in that figure was the  
10:08:14 23 house.

10:08:15 24 Q. No, I'm looking at your report. It says  
10:08:19 25 \$606,850.

10:08:20 1 A. But that included the house.

10:08:21 2 Q. That includes the house?

10:08:22 3 A. Yes.

10:08:22 4 Q. And all the lots?

10:08:23 5 A. Yes.

10:08:24 6 Q. All the lots in the subdivision?

10:08:26 7 A. Yes.

10:08:28 8 Q. Well, there are 13 lots.

10:08:30 9 A. That's what happens over time when you have --

10:08:36 10 Q. So you're telling this jury that before --

10:08:39 11 THE COURT: Let's let him finish the answer.

10:08:42 12 That's what happens over time when you have --

10:08:45 13 A. That's what happens over time when you have a  
10:08:47 14 property that's not increasing in value that's selling  
10:08:50 15 only two lots per year. And when you discount and  
10:08:53 16 deduct the expenses over a six-year period, your value  
10:08:58 17 is dramatically affected. And it's not -- it's going to  
10:09:06 18 be worth a lot less than it is if you sold them all  
10:09:10 19 outright now.

10:09:11 20 Q. The \$606,850 is with the house on lot 15?

10:09:16 21 A. That is with the house, but that's what happens  
10:09:18 22 when you sell them every year, when you sell them on an  
10:09:23 23 annual basis, it's going to take six years to sell them  
10:09:26 24 off.

10:09:26 25 Q. Then what would you tell the jury the value was

10:09:29 1 after the trees were cut?

10:09:33 2 A. I told you, I just subtracted the \$20,000 which I  
10:09:37 3 thought it would cost to replace those trees.

10:09:41 4 Q. So that's \$586,850.

10:09:49 5 A. Correct.

10:09:50 6 Q. So if I take your \$586,000, and I subtract  
10:10:13 7 \$310,000 for the house -- is that what I would do?

10:10:18 8 A. Well --

10:10:19 9 Q. I mean, if I'm trying to figure out the value of  
10:10:22 10 the lots --

10:10:23 11 A. The only way to do that would be to go back to  
10:10:28 12 the back to the discounted cash flow, take the house out  
10:10:32 13 of there, and do it without the house being in there.  
10:10:35 14 The first year cash flow had the house in it. So --

10:10:39 15 Q. Well, my question is --

10:10:40 16 A. I don't think you can just do it and subtract.

10:10:43 17 Q. I can't subtract \$310,000?

10:10:45 18 A. Well, I have the house selling the first year.

10:10:49 19 Q. Do you have it selling for 310?

10:10:51 20 A. Yeah.

10:10:54 21 Q. So should I discount it one year?

10:10:57 22 A. That's what I did, yeah. That would be  
10:11:00 23 discounted at one year.

10:11:01 24 Q. Discount at 10 percent?

10:11:04 25 A. This is a 20 percent discount rate.

10:11:07 1 Q. So if I take \$310,000 by 20 percent, that's --

10:11:15 2 THE JUROR: 62.

10:11:17 3 A. I'm not sure.

10:11:18 4 Q. Well, ten percent would be 31.

10:11:22 5 A. I'm not sure that's exactly going to work out,  
10:11:24 6 but it won't be that far off if you want to do it that  
10:11:27 7 way.

10:11:28 8 Q. So let's say ten percent off the house.

10:11:30 9 A. That would be 240, something like that.

10:11:34 10 Discounting it one year.

10:11:36 11 Q. Well, it would be --

10:11:37 12 A. It would be 80 percent of --

10:11:42 13 Q. 248?

10:11:45 14 A. Somewhere in that range.

10:11:59 15 Q. So you're telling the jury that the lots, the 13  
10:12:04 16 lots are only worth now, after the trees are gone,  
10:12:13 17 338,850 bucks, right? That's what you said? I just did  
10:12:28 18 the math.

10:12:29 19 A. I didn't do my appraisal that way, and --

10:12:33 20 Q. But that's the effect of it; is it not?

10:12:36 21 A. If you effectively want to make those  
10:12:38 22 calculations, that sounds reasonable.

10:12:39 23 Q. And that's for 13 lots, right?

10:12:46 24 A. That's what happens when you sell two of  
10:12:48 25 something per year over a six-year period. It wastes

10:12:54 1 away your value tremendously. Any developer will tell  
10:12:58 2 you that if you don't sell off your lots pretty darn  
10:13:03 3 quickly, that it's a wasting away process. And it  
10:13:09 4 really deteriorates your value. The longer it takes  
10:13:12 5 and the slower your lots sell out, the less profitable  
10:13:16 6 it is, and the less you end up with. And that's the  
10:13:22 7 worst thing that can happen when you develop a property  
10:13:25 8 is to have very, very slow sales.

10:13:31 9 Q. And did you look at Mr. Keesey's appraisal?

10:13:36 10 A. I did.

10:13:37 11 Q. He used a different methodology, correct, in  
10:13:43 12 doing his appraisal?

10:13:44 13 A. He simply added all the lots up.

10:13:47 14 Q. The question is: Did he use a different  
10:13:50 15 methodology?

10:13:50 16 A. Yeah.

10:13:51 17 Q. He used a retail value as opposed to a  
10:13:53 18 subdivision discount, correct?

10:13:55 19 A. Yes.

10:13:58 20 MR. ROBON: No further questions.

10:14:06 21 THE COURT: Why are you standing up?

10:14:07 22 MR. BAHRET: Do you want me to sit?

10:14:10 23 THE COURT: Usually we only let the lawyers  
10:14:11 24 go two rounds. There was a new area of inquiry,  
10:14:20 25 although there was no objection to it. Had there been,

10:14:22 1 I would sustain it. I will allow you very limited  
10:14:25 2 inquiry into that new area.

10:14:28 3 BY MR. BAHRET:

10:14:29 4 Q. Bob, the only thing I want to ask you about is  
10:14:31 5 the Keesey report. You were asked if he used a  
10:14:36 6 different methodology.

10:14:37 7 A. Yes.

10:14:38 8 Q. Do you disagree with his methodology?

10:14:40 9 A. I do.

10:14:41 10 Q. Why?

10:14:41 11 A. Well, you can't take lots or -- well, let's just  
10:14:49 12 say you can't take lots and say, okay, here's the value  
10:14:52 13 of your eight or ten or 13 lots or whatever it is, and  
10:14:56 14 add them up and say, here's your number, and that is  
10:14:58 15 what the whole thing is worth. Because you can't sell  
10:15:01 16 all of those lots within, say, six months, or whatever  
10:15:06 17 current market value would be. If you want to add all  
10:15:09 18 those up into a value, you have to sell them all within  
10:15:13 19 six months. If it's going to take you years, in my  
10:15:16 20 estimation, a good six years to sell them off, that is  
10:15:19 21 not your value. It's not worth what those are all added  
10:15:24 22 up as a sum total. That's incorrect.

10:15:29 23 Q. You need to consider not only present value, but  
10:15:33 24 the expenses associated with keeping them for six years?

10:15:36 25 A. You're going to have selling expenses; you're

10:15:39 1 going to have property taxes, and so on and so forth  
10:15:42 2 over a six-year period. They're not worth that because  
10:15:44 3 you can't sell them for that today.

10:15:46 4 MR. BAHRET: Thank you very much. And  
10:15:47 5 thank you, Your Honor, for letting me go there.

10:15:50 6 THE COURT: You may step down.

10:16:00 7 Defendants may call its next witness.

10:16:04 8 Ladies and gentlemen, do you want to take a  
10:16:06 9 break? We'll take our morning break. It's 10:15.

10:16:11 10 15 minutes. 10:30. Please remember the rules.

10:16:14 11 (Recess taken.)

10:17:00 12 (Jury exits the courtroom.)

10:17:01 13 THE COURT: I have had an opportunity to  
10:17:02 14 review two exhibits that I did not rule on this morning.  
10:17:05 15 Exhibit Number 91, a photograph, was discussed with Mr.  
10:17:10 16 Sumner. He could not identify the exhibit; and  
10:17:13 17 therefore, I'm going to sustain the objection, and  
10:17:16 18 Exhibit 91 will not be admitted.

10:17:18 19 With respect to Exhibit 92, this is the  
10:17:22 20 picture of the tree stump with the red line. This was  
10:17:25 21 also discussed with Mr. Sumner who could not identify  
10:17:28 22 the exhibit as to taking of the photo or the location of  
10:17:31 23 the photo. Mr. Huber did discuss the exhibit briefly  
10:17:38 24 with respect to the tree stump but made no  
10:17:40 25 identification of the location of the photograph. And



10:17:42 1 Mr. McCarthy did testify about the exhibit, indicated  
10:17:46 2 that either he took the photo or was present when it was  
10:17:50 3 taken. However, there is a red line in the photograph.  
10:17:53 4 And there was no foundation presented during his  
10:17:55 5 testimony. In fact, there was an objection to Mr.  
10:17:58 6 McCarthy testifying about the red line. I sustained  
10:18:02 7 that objection; and therefore, consistently, will rule  
10:18:05 8 out Exhibit Number 92 which, although it may have some  
10:18:09 9 probative value, I believe is outweighed by prejudice or  
10:18:15 10 confusion because of the red line in the photograph.

10:18:18 11 MR. ROBON: Your Honor, could we just cut  
10:18:20 12 off the red line?

10:18:22 13 THE COURT: You could; however, at this  
10:18:23 14 point the photograph has been discussed with the red  
10:18:26 15 line. And to now take it out and to alter it in order  
10:18:29 16 to allow it to be admitted, I'm hesitant to do that.  
10:18:34 17 But if counsel doesn't object to taking it out -- I'm  
10:18:38 18 not sure how you take it off.

10:18:43 19 MR. ROBON: I was going to say with a paper  
10:18:46 20 cutting.

10:18:46 21 MR. BAHRET: That will draw their attention  
10:18:48 22 to it more.

10:18:49 23 MR. ROBON: They won't know what it was.

10:18:50 24 THE COURT: Then it will be a strange  
10:18:52 25 photograph to them that's been cut off. I think it

10:18:55 1 raises more questions and contributes to my concern  
10:18:58 2 about confusion and misleading the jury. Therefore, I  
10:19:01 3 will rule out Exhibit 92 as well.

10:19:04 4 That covers the exhibits that have been  
10:19:06 5 presented to me for ruling. You may have some more  
10:19:09 6 that you're going to talk about. We'll deal with those  
10:19:12 7 later.

10:19:12 8 MR. ROBON: Your Honor, we would move to  
10:19:14 9 strike Mr. Domini's testimony. None of his opinions  
10:19:18 10 met the standard of the rules of being to a reasonable  
10:19:22 11 degree of certainty. He never was asked that question  
10:19:25 12 at any point in time.

10:19:29 13 MR. WATKINS: No objection was made either.

10:19:32 14 THE COURT: I'll overrule the objection.  
10:19:36 15 The jury can weigh the testimony of the two experts and  
10:19:39 16 determine what they want to do with it.

10:19:41 17 (Recess taken.)

10:32:27 18 (The witness was sworn by the clerk.)

10:32:28 19 THE COURT: Defendant has called its next  
10:32:30 20 witness. He has been sworn, and you may inquire.

10:32:37 21 - - -

10:32:37 22 TODD JENKINS, DIRECT EXAMINATION

10:32:39 23 BY MR. BAHRET:

10:32:39 24 Q. Sir, could you introduce yourself to the jury,  
10:32:43 25 please.

10:32:43 1 A. Yes. My name is Todd Jenkins. I'm with  
10:32:47 2 Peterman Associates.

10:32:48 3 Q. Peterman Associates is what sort of firm?

10:32:50 4 A. A civil engineering and architectural firm.

10:32:54 5 Q. What is your specialty?

10:32:56 6 A. I am the engineering project manager,  
10:32:59 7 specializing in the civil engineering portion of the  
10:33:01 8 company.

10:33:01 9 Q. And are you trained as a civil engineer?

10:33:05 10 A. Yes, I am. I have a bachelor's and master's  
10:33:08 11 degree in civil engineering.

10:33:10 12 Q. Where did you get your master's?

10:33:12 13 A. University of Toledo.

10:33:14 14 Q. How long have you been affiliated with Peterman?

10:33:17 15 A. Since 1994.

10:33:18 16 Q. And in the course of your association with  
10:33:20 17 Peterman, were you called upon to participate in any  
10:33:22 18 part of the plan for Cambridge Subdivision?

10:33:25 19 A. Yes, I was.

10:33:26 20 Q. What was your role?

10:33:27 21 A. I was the engineer that oversaw the design of the  
10:33:30 22 original subdivision.

10:33:32 23 Q. Okay. And did that include laying out the lots  
10:33:35 24 and so forth?

10:33:36 25 A. Yes, laying out the lots, roadways, and

10:33:39 1 utilities.

10:33:40 2 Q. Did that include the drainage plan?

10:33:42 3 A. Yes, it did.

10:33:57 4 Q. You recognize Exhibit M?

10:34:02 5 A. Yes, Exhibit M are the construction drawings for  
10:34:07 6 Cambridge Subdivision.

10:34:08 7 Q. Are these things you prepared or supervised the  
10:34:11 8 preparation over?

10:34:11 9 A. I supervised the preparation.

10:34:14 10 Q. Is that an accurate copy of the plans?

10:34:17 11 A. It appears to be, yes.

10:34:19 12 Q. And can you identify Exhibit F?

10:34:27 13 A. Exhibit F is sheet 9 out of the construction  
10:34:30 14 drawings which is the grading plan for Cambridge  
10:34:35 15 Subdivision.

10:34:35 16 Q. So that would be in here also?

10:34:37 17 A. Yes, it should be.

10:34:39 18 Q. Okay. Can you describe what the identifying  
10:34:48 19 marks and so forth are on that drainage plan for the  
10:34:51 20 jury?

10:34:54 21 A. There are numbers that are listed which are  
10:34:58 22 elevations that show the proposed elevations throughout  
10:35:01 23 the subdivision. There are squiggle lines with  
10:35:05 24 arrowheads that indicate the direction of surface water  
10:35:08 25 drainage.

10:35:09 1 Q. Would it be possible, Mr. Jenkins, could you step  
10:35:12 2 over here perhaps and use this device? If you put it  
10:35:16 3 down here -- I know it's a large document, but you might  
10:35:20 4 be able to point and explain the things on there.

10:35:34 5 A. All right. The dash lines here with these  
10:35:38 6 numbers indicate the existing elevations prior to  
10:35:41 7 construction. These numbers here show proposed  
10:35:48 8 elevation, these numbers here. These numbers in the  
10:35:52 9 square show where the building pad elevation should be  
10:35:56 10 following the end of construction. These lines here  
10:35:59 11 indicate where storm sewers are located. The locations  
10:36:04 12 labelled with a CB and then a number, those are catch  
10:36:08 13 basins which drain surface water, and these squiggle  
10:36:12 14 lines here with the arrowheads show the direction that  
10:36:15 15 the surface water should flow in order to get into those  
10:36:18 16 catch basins.

10:36:19 17 Q. Could you take us down and show us the flow  
10:36:21 18 starting at lot 9?

10:36:38 19 A. Starting up here at lot 9, the rear of the lots  
10:36:42 20 were to drain to a catch basin that was to be installed  
10:36:45 21 in this location. The side lot here and the rear lot  
10:36:48 22 was also to drain back to this catch basin. The  
10:36:51 23 drainage from lot 10 in the rear yard was to drain back  
10:36:55 24 to that catch basin then here in between these lots to  
10:37:00 25 this catch basin.

10:37:01 1 Q. Do I understand correctly lot 9, the water is  
10:37:04 2 draining --

10:37:06 3 A. Looking at that map from the bottom, it's  
10:37:09 4 draining from my left to right. And lot 10 is going  
10:37:12 5 from my right to left. Yes.

10:37:17 6 Q. And what are these things written outside the --  
10:37:25 7 do you see where I'm pointing, the squiggles that are  
10:37:29 8 on the south side of that dark line?

10:37:32 9 A. These here?

10:37:39 10 Q. Right there.

10:37:39 11 A. Those lines are existing contours.

10:37:44 12 Q. Let me get that so the jury can see it. These  
10:37:46 13 are existing contours?

10:37:48 14 A. Yes.

10:37:49 15 Q. Does that tell us which way those are sloped?

10:37:56 16 A. In this particular location, I don't have enough  
10:37:59 17 labels to show exactly where those are sloped. Further  
10:38:02 18 down here -- wait a minute. I can trace it through.  
10:38:09 19 These contours slope this way.

10:38:13 20 Q. So it's sloped towards -- from the railroad  
10:38:16 21 property, those contours are on the railroad property?

10:38:19 22 A. Yes, correct.

10:38:20 23 Q. So it's sloped toward Cambridge?

10:38:24 24 A. Yes.

10:38:29 25 Q. Is it the same deal down here behind lot 15?

10:38:33 1 A. Yes.

10:38:35 2 Q. So in the area behind lot 15, the railroad  
10:38:38 3 property slopes towards Cambridge?

10:38:40 4 A. Yes. There's a portion of the railroad property  
10:38:44 5 that slopes towards Cambridge.

10:38:45 6 Q. So did you -- I think you can go ahead and take  
10:38:49 7 your seat back.

10:38:51 8 Did you have to account for some water coming  
10:38:53 9 from the railroad then when developing the water plan  
10:39:00 10 for Cambridge?

10:39:00 11 A. Yes, we did.

10:39:03 12 Q. Was the Cambridge Subdivision water plan supposed  
10:39:08 13 to be -- I'll call it self-contained?

10:39:12 14 A. Yes, all the water from the subdivision was to  
10:39:15 15 drain internally to the storm drains that were designed  
10:39:18 16 for the subdivision.

10:39:19 17 Q. Plus some from the railroad?

10:39:20 18 A. Yes.

10:39:21 19 Q. And would you tell us what the design standard  
10:39:24 20 for the drainage plan was?

10:39:26 21 A. The design standard was for a five-year design  
10:39:29 22 standard.

10:39:29 23 Q. And you're going to have to help us with that  
10:39:32 24 one, sir.

10:39:32 25 A. Sure. That would mean on average three inches

10:39:36 1 of rainfall over a 24-hour period.

10:39:38 2 Q. The should be able to handle that then?

10:39:41 3 A. Yes, that's correct.

10:39:42 4 Q. What if it exceeds that?

10:39:44 5 A. If it exceeds that, then the sewers would back up  
10:39:47 6 and you would have water that would flow basically out  
10:39:50 7 of the catch basins and onto the surface.

10:39:52 8 Q. Ponding?

10:39:53 9 A. Ponding, yes.

10:39:55 10 Q. And you're familiar with the past couple of years  
10:39:59 11 in northwest Ohio?

10:40:00 12 A. Yes.

10:40:01 13 Q. And generally familiar including up here, not  
10:40:05 14 just Findlay?

10:40:06 15 A. Yes.

10:40:07 16 Q. Have you had more than one storm exceeding the  
10:40:10 17 design standards for the drainage plan for --

10:40:15 18 MR. ROBON: Objection.

10:40:16 19 THE COURT: Grounds?

10:40:17 20 MR. ROBON: I don't think he's qualified.

10:40:18 21 I think you need someone from the Bureau of Statistics,  
10:40:22 22 from the Toledo Express Airport.

10:40:24 23 THE COURT: Let's see if there's any more  
10:40:26 24 information he can elicit that would allow him to do the  
10:40:29 25 same thing.



10:40:29 1 BY MR. BAHRET:

10:40:29 2 Q. Are you familiar with rainfall amounts that have  
10:40:32 3 fallen in the last couple of years?

10:40:34 4 A. Yes, from hearing the news and so forth, yes.

10:40:37 5 Q. And from those reports have you received  
10:40:39 6 information that we've exceeded the design standards for  
10:40:43 7 Cambridge on more than one occasion?

10:40:45 8 MR. ROBON: Objection. There's no  
10:40:52 9 evidence, Your Honor, that that rain occurred at the  
10:40:55 10 Cambridge subdivision. We know Findlay flooded, where  
10:41:02 11 he lived.

10:41:04 12 MR. BAHRET: I asked him if he was familiar  
10:41:06 13 with this area as well, not just Findlay.

10:41:08 14 THE COURT: I understand. Is there any  
10:41:10 15 other information you can elicit as foundation for his  
10:41:13 16 testimony?

10:41:16 17 MR. BAHRET: Just his familiarity with it.  
10:41:18 18 He says he knows.

10:41:20 19 THE COURT: Is this something that you  
10:41:22 20 utilize in the ordinary course of your business, your  
10:41:25 21 profession?

10:41:27 22 THE WITNESS: We typically will just out of  
10:41:29 23 professional interest observe rain fall amounts,  
10:41:33 24 different storms and so forth. Again, following the  
10:41:36 25 news and so forth. I have not looked up specific

10:41:39 1 statistics for the Cambridge Subdivision, that area or  
10:41:43 2 from Toledo Express Airport; however, I am generally  
10:41:45 3 familiar with the severity of the rainfalls that we've  
10:41:49 4 had in recent years.

10:41:50 5 THE COURT: And you're familiar with that  
10:41:52 6 severity because of a passing interest?

10:41:57 7 THE WITNESS: Because I would say a  
10:41:58 8 professional interest because obviously we design  
10:42:03 9 drainage, so the amount of rainfall that we're getting  
10:42:06 10 is of interest, and how that affects developments that  
10:42:09 11 we're designing and so forth.

10:42:12 12 THE COURT: I'll overrule the objection and  
10:42:14 13 allow him to answer.

10:42:15 14 BY MR. BAHRET:

10:42:16 15 Q. Sir, to take that point a bit further, since you  
10:42:21 16 do design drainage plans, if we would year after year  
10:42:24 17 after year have excessive rain, would you increase the  
10:42:27 18 design standards for the next subdivision?

10:42:29 19 A. We would not increase the design standard;  
10:42:32 20 however, we would discuss with our clients the severity  
10:42:35 21 of the rainfalls that we've been experiencing and pose  
10:42:38 22 the question to them whether they would want us to  
10:42:40 23 exceed the design standard or not simply to further  
10:42:43 24 protect their subdivision.

10:42:44 25 Q. And if you would design it to -- what's the next

10:42:50 1 term? You said yours was a five-year standard?

10:42:52 2 A. The next is a ten-year.

10:42:56 3 Q. Would it cost more to do a ten-year drainage plan  
10:43:00 4 than a five-year?

10:43:00 5 A. To construct?

10:43:01 6 Q. Yeah. What's the factor? Why would a client  
10:43:04 7 refuse?

10:43:05 8 A. There's a cost factor for construction.

10:43:07 9 Q. Okay. Now, getting back to the question that got  
10:43:11 10 us here, do you have information as to whether we've had  
10:43:15 11 more than one storm in 2006 and 2007 that exceeds the  
10:43:18 12 design standard for the Cambridge Subdivision drainage  
10:43:23 13 plan?

10:43:23 14 A. Again, from following the news and so forth I can  
10:43:26 15 say: Yes, there have been several storms that have  
10:43:28 16 exceeded that.

10:43:29 17 Q. And would it be reasonable to expect any -- is  
10:43:34 18 ponding the proper term to use?

10:43:35 19 A. Yes, that can be used.

10:43:37 20 Q. Would it be reasonable to expect ponding in the  
10:43:39 21 back of the Cambridge Subdivision when we have those  
10:43:42 22 storms?

10:43:42 23 A. Yes.

10:43:44 24 MR. ROBON: Objection?

10:43:47 25 THE COURT: Overruled.

10:43:51 1 A. Yes.

10:43:52 2 THE COURT: You may cross.

10:43:53 3 MR. ROBON: Thank you, Your Honor.

10:43:53 4 - - -

10:43:53 5 TODD JENKINS, CROSS-EXAMINATION

10:43:53 6 BY MR. ROBON:

10:43:56 7 Q. Mr. Jenkins, in the last two or three weeks has  
10:44:00 8 there been a lot of rain in Perrysburg or very little?

10:44:02 9 A. Recently I haven't paid attention to the news to  
10:44:05 10 see if there was in Perrysburg.

10:44:07 11 Q. Let's just assume there was very little. Okay?

10:44:10 12 A. Okay.

10:44:10 13 Q. My question to you is: When the jury went out to  
10:44:13 14 the Cambridge Subdivision, and some of the jurors walked  
10:44:18 15 up on the railroad bank and they looked down on lot 16,  
10:44:26 16 And they saw water that was probably, I would guess,  
10:44:29 17 somewhere between ten and 15 inches deep just sitting  
10:44:34 18 there --

10:44:35 19 MR. BAHRET: Your Honor, I'm going to object  
10:44:36 20 to him saying that was on lot 16.

10:44:42 21 THE COURT: I think we should stay away from  
10:44:44 22 describing what the jury saw in the jury view. What  
10:44:48 23 the jury saw on the jury view, as I indicated at the  
10:44:51 24 start of the trial, is not evidence. It was an  
10:44:53 25 orientation. And you can ask a question, I think,

10:44:58 1 without referencing what you saw or what they may have  
10:45:01 2 seen during that jury view, please.

10:45:05 3 BY MR. ROBON:

10:45:05 4 Q. Assume that there's ten to 15 inches of water.  
10:45:09 5 There actually was a 12-inch pipe that came out from the  
10:45:13 6 railroad property that you could see the 12 inch  
10:45:16 7 diameter pipe, and it was under water by probably three  
10:45:19 8 inches. Assume that's there. Would that water be  
10:45:25 9 coming from the Cambridge Subdivision, or would it be  
10:45:27 10 coming from another source since there was no rain?

10:45:32 11 MR. BAHRET: I object to him saying there's  
10:45:34 12 been no rain. There was rain.

10:45:36 13 MR. ROBON: No significant rain.

10:45:37 14 THE COURT: It's an assumption in the  
10:45:39 15 question. The objection is overruled. The witness may  
10:45:42 16 answer.

10:45:42 17 A. I don't have enough information, having not  
10:45:45 18 observed the site recently. I don't know how I could  
10:45:48 19 answer the question where the water came from.

10:45:49 20 Q. Why wouldn't you have stopped out at the site on  
10:45:52 21 the way here this morning so that you could personally  
10:45:55 22 examine it and tell the jury about the water?

10:46:01 23 A. I did not think about swinging by the  
10:46:05 24 subdivision, no.

10:46:05 25 Q. And the attorney for the City or the City

10:46:07 1 engineers didn't tell you to?

10:46:08 2 A. No. No one's given me any instructions.

10:46:11 3 Q. Were you aware of the manhole on the railroad  
10:46:15 4 property probably about 100, 150 feet north of the  
10:46:22 5 corner of lot 16?

10:46:27 6 A. I was not aware of it. I've been told about it  
10:46:29 7 recently.

10:46:45 8 MR. ROBON: Your Honor, could I have the  
10:46:46 9 witness come over to the board here?

10:46:50 10 THE COURT: Sure.

10:47:02 11 BY MR. ROBON:

10:47:03 12 Q. This is a graphic that has been drawn. This  
10:47:07 13 is -- the drain that you show in your plans is here.  
10:47:11 14 There is a manhole --

10:47:13 15 MR. BAHRET: You guys are going to have to  
10:47:15 16 reposition. Not everybody can see what you're trying  
10:47:15 17 to do.

10:47:15 18 BY MR. ROBON:

10:47:18 19 Q. There is a manhole here on the railroad property  
10:47:21 20 that the evidence has indicated that it used to go under  
10:47:25 21 the old Toledo terminal tracks to this ditch and empty.  
10:47:31 22 AND when they put the City waterline in here, they cut  
10:47:35 23 this 24-inch diameter drain pipe and did not replace it.  
10:47:42 24 They just bulkheaded it. So now the evidence has been  
10:47:46 25 that there's a railroad drain that enters here, goes

10:47:51 1 down to here, and there's one here that goes down to  
10:47:54 2 here, and in this whole area, water is ponding, and the  
10:48:01 3 water runs this way. We saw a video this morning that  
10:48:05 4 Mr. McCarthy, who lives in lot 15, we saw the water come  
10:48:09 5 this way. Now, my question to you is, the drainage  
10:48:13 6 system that you designed did not account for water  
10:48:18 7 coming from off the subdivision, correct?

10:48:21 8 A. Not all of this down here. It only accounted  
10:48:25 9 for a minimal amount along here. The ditch handled the  
10:48:29 10 rest.

10:48:30 11 THE COURT: You're going to have to keep  
10:48:31 12 your voice up or give Mr. Jenkins the microphone.

10:48:59 13 (Discussion had off the record.)

10:49:00 14 BY MR. ROBON:

10:49:00 15 Q. Also, Mr. McCarthy brought some fill dirt in one  
10:49:04 16 day after they cut the trees. He thought he was going  
10:49:08 17 to build a barrier, said, Stop, because you're going  
10:49:11 18 to --

10:49:12 19 MR. BAHRET: Objection.

10:49:13 20 THE COURT: Get to the question without --

10:49:16 21 Q. Anyway, there's fill dirt that's been brought in  
10:49:18 22 on the back of lot 16 here and also on 15. Mr.  
10:49:22 23 McCarthy testified that he put a drain pipe from here  
10:49:26 24 out to here, that's the 12-inch pipe that I referenced a  
10:49:33 25 little bit ago that's under water. Is it probable that

10:49:36 1 the water that's in this drain tile is now emptying out  
10:49:41 2 here or coming out here and that's where all this water  
10:49:46 3 is coming from? This since that has been cut --

10:49:53 4 A. To clarify, he connected the 12 inch tile to the  
10:49:56 5 drain on the railroad property and extended over?

10:49:58 6 Q. Yes.

10:49:59 7 A. In that situation it would be potentially  
10:50:02 8 possible that water could back up through there, yes.

10:50:05 9 Q. Because the water would have no outlet here?  
10:50:09 10 It's just going to go wherever it can get out, correct?  
10:50:12 11 That's what water does?

10:50:13 12 A. Based on what I've seen here, yes.

10:50:16 13 Q. Now, my next question to you is: The grade that  
10:50:19 14 was on the railroad here all the way up to Ford Road has  
10:50:23 15 been raised because when they excavated the six and a  
10:50:29 16 half foot high tile for the water main, they kept all of  
10:50:34 17 the earth on-site. So I don't know if they raised it  
10:50:39 18 six inches or two feet, but they raised the grade.  
10:50:43 19 Where is that water going?

10:50:45 20 MR. BAHRET: Objection. It assumes there's  
10:50:49 21 more water that would hit it just because it's higher.

10:50:49 22 BY MR. ROBON:

10:50:51 23 Q. If there's no drain on the railroad site on this  
10:50:54 24 side of the waterline, it would run onto the Cambridge  
10:51:01 25 property, wouldn't it?



10:51:03 1 THE COURT: Mr. Jenkins, do you understand  
10:51:05 2 the question?

10:51:09 3 THE WITNESS: Your Honor I'm trying to  
10:51:10 4 follow exactly what he's getting at.

10:51:12 5 A. I think based on where that fill would be placed,  
10:51:15 6 I don't know how I could actually answer that question.

10:51:21 7 Q. But the water on the railroad property has to go  
10:51:25 8 someplace, right?

10:51:26 9 A. Yes, the water has to go somewhere.

10:51:27 10 Q. And you would agree with me that on your  
10:51:29 11 topographical map, the railroad here is higher than the  
10:51:33 12 back of the lots 9 to 16?

10:51:37 13 A. Yes, there is a portion of the railroad property  
10:51:39 14 that was higher.

10:51:40 15 Q. And if the railroad drain that was here is  
10:51:45 16 plugged, then if the railroad made plans to get rid of  
10:51:50 17 the water, there's no way it could get rid of the water  
10:51:53 18 if it's plugged or severed, correct?

10:51:56 19 A. Right. If this was the outlet, there's no way  
10:51:59 20 that this 12-inch tile could drain anywhere except to  
10:52:02 21 back up.

10:52:06 22 Q. Do you have an idea what a pumping station would  
10:52:10 23 cost to pump the water -- build a pumping station here  
10:52:14 24 and pump the water over the top of the water main into  
10:52:18 25 this ditch?

10:52:19 1 MR. BAHRET: I would object. It's outside  
10:52:21 2 the scope.

10:52:22 3 THE COURT: Overruled. He may answer.

10:52:24 4 A. It would depend on the capacity of the pump  
10:52:27 5 station, the type of pumps, and so forth. It would  
10:52:30 6 require a lot more analysis than just guesstimating.

10:52:33 7 Q. Mr. Huber, the Wood County engineer, indicated  
10:52:36 8 \$200,000-plus. Is that in the ballpark?

10:52:39 9 A. That could be in the ballpark depending, again,  
10:52:42 10 upon the flow.

10:52:42 11 Q. My next question for you to answer for the jury  
10:52:46 12 is Mr. McCarthy indicated that perhaps they would have  
10:52:52 13 to run a drain from either behind lots 15 or 16, a new  
10:52:58 14 deeper drain out here or under the road and create a  
10:53:04 15 retention pond here to empty into River Road. And he  
10:53:09 16 came up with a cost of approximately \$200,000 to run the  
10:53:16 17 pipe and another \$200,000 for a retention pond. Do  
10:53:21 18 those numbers sound reasonable to you if he had to do  
10:53:25 19 that? Because I assume this would have to be 12 or 13  
10:53:28 20 feet deep since the elevations -- well, you can look at  
10:53:33 21 the elevations on your exhibit. This is Exhibit F. I  
10:53:42 22 think they go from 615 feet above sea level to 624. So  
10:53:49 23 there's a nine-foot grade difference between the back of  
10:53:53 24 the lot and the front of the lot. What does that mean  
10:53:56 25 for the jury when you're talking about running a drain

10:53:59 1 north?

10:54:01 2 A. At the low end you would need the pipe to be  
10:54:03 3 below the ground, so you would be probably a couple of  
10:54:06 4 feet down below that so that when you're going through  
10:54:09 5 this area, you have to dig because you have to slope  
10:54:12 6 down; you're going to be significantly deeper than two  
10:54:15 7 or three feet that you start at.

10:54:17 8 Q. So if I start at three feet down here, and I'm  
10:54:20 9 nine feet, so I'd have to be at least 12 feet deep in  
10:54:24 10 this area?

10:54:25 11 A. Yes, that's a reasonable assumption.

10:54:28 12 Q. And all the utilities, the underground electric  
10:54:32 13 and everything like that are in the right-of-way up here  
10:54:35 14 by the street; are they not?

10:54:37 15 A. I'm not sure where the electric and so forth went  
10:54:39 16 in. But I know the waterlines and sanitary sewer and  
10:54:43 17 so forth is along the street.

10:54:45 18 Q. And to bore under a road is costly?

10:54:51 19 A. Compared to open cutting it can be costly, yes.

10:54:54 20 Q. So my question is, is the \$200,000 to run a line  
10:55:00 21 out to the road a reasonable estimate, and another  
10:55:06 22 \$200,000 for a retention ponds if it's required?

10:55:11 23 A. Do you know the distance for the storm sewer, the  
10:55:14 24 length?

10:55:15 25 Q. Well, take your lot distances. They're on here.

10:55:23 1 Here you have 238 feet.

10:55:26 2 A. Okay. So we're looking at maybe 600 feet or so?

10:55:30 3 \$200,000 seems a little high. But that's all

10:55:33 4 subjective. It would depend on actual costs.

10:55:37 5 Q. You say a little bit high. Ten percent too high?

10:55:40 6 A. It could be as much as 20 or 30 percent high.

10:55:45 7 It all depends on your contractor's bids.

10:55:48 8 Q. And it could be 10 to 30 percent low?

10:55:51 9 A. In my opinion, I don't think so. But depending

10:55:53 10 upon the bidding market. Yeah, that could be a

10:55:55 11 possibility.

10:55:56 12 Q. And my next question is, new subdivisions and new

10:56:02 13 drainage plans, the EPA and the government require

10:56:06 14 retention on-site now; do they not?

10:56:10 15 A. Yes, the EPA does require water quality standards

10:56:13 16 to be enforced.

10:56:14 17 Q. And when you put this subdivision in, there was

10:56:17 18 no such requirement, correct?

10:56:18 19 A. Right. There was no such requirement for

10:56:20 20 detention or for water quality volume.

10:56:23 21 Q. So there's no assurance that the state would even

10:56:29 22 allow the tapping of the drainage line on River Road,

10:56:35 23 correct?

10:56:36 24 A. A permit would have to be obtained and the state

10:56:38 25 would have to be consulted whether or not they would

10:56:42 1 allow it.

10:56:42 2 Q. Tell the jury why they might not allow it.

10:56:45 3 MR. BAHRET: Objection.

10:56:48 4 THE COURT: Well, are we getting a bit far  
10:56:51 5 afield here.

10:56:52 6 MR. ROBON: One of the cure items is tapping  
10:56:54 7 into that storm sewer.

10:56:55 8 THE COURT: I understand. But now we're  
10:56:57 9 asking this witness to respond how the state might or  
10:57:02 10 might not offer a permit. Do we have a basis for him  
10:57:05 11 to offer such opinion testimony?

10:57:06 12 MR. ROBON: I think he's an expert.

10:57:08 13 THE COURT: You better lay more of a  
10:57:11 14 foundation. An expert can't talk about anything and  
10:57:14 15 everything.

10:57:14 16 BY MR. ROBON:

10:57:15 17 Q. Mr. Jenkins, you applied for state permits in the  
10:57:17 18 past as part of your engineering work?

10:57:19 19 A. Yes, we have.

10:57:20 20 Q. And all of them have been approved?

10:57:28 21 A. I can't say for certain, but I don't recall ever  
10:57:31 22 having one denied.

10:57:33 23 Q. If the capacity of the drain on River Road --  
10:57:40 24 let's say this is a ten-inch drain, and we've got a  
10:57:44 25 12-inch drain going into it. Would that be one of the

10:57:47 1 reasons that the state might say, No, we're not going to  
10:57:51 2 allow you to do it, or, we're going to require you to  
10:57:55 3 build a retention pond and only have a three- or  
10:57:58 4 four-inch pipe go out to the road?

10:57:59 5 MR. BAHRET: Objection. Assumes facts not  
10:58:01 6 in evidence, and it's speculative.

10:58:04 7 THE COURT: The question assumes, and we've  
10:58:09 8 had a number of those kind of questions that assume  
10:58:12 9 facts. I will instruct the jury at the end of the case  
10:58:14 10 how to handle those. So with that he may answer the  
10:58:17 11 question, if he can.

10:58:18 12 A. Typically when we look at connecting a storm  
10:58:20 13 sewer into a state storm sewer, the state would  
10:58:23 14 determine what capacity that sewer has, and we would  
10:58:25 15 have to limit our flow in our design to the capacity of  
10:58:30 16 the existing sewer.

10:58:32 17 Q. So since this subdivision does not have any  
10:58:35 18 retention on-site, water -- and it's common, like, in a  
10:58:43 19 parking lot you see a big slope that goes down to a  
10:58:47 20 drain; there's a small tile, and the water ponds up when  
10:58:50 21 it rains. Is that what we're talking about, so the  
10:58:53 22 jury understands it?

10:58:55 23 A. That is one way of providing retention.

10:58:57 24 Q. Or the other way is to dig a pond. And the only  
10:59:00 25 place for that to happen is in this park area here,

10:59:04 1 correct?

10:59:04 2 A. That, or at the back of the lots and so forth.

10:59:07 3 Q. Or give up a building lot?

10:59:09 4 A. Yes. Either give up a building lot or, again,  
10:59:12 5 you -- these lots are deep enough you could use a  
10:59:16 6 portion behind the lots and put it in an easement.

10:59:20 7 Q. Or cut all those trees? But you'd have to cut  
10:59:25 8 all these trees down back there?

10:59:27 9 A. That would be one of the results.

10:59:28 10 Q. The cost of putting in a retention pond on a  
10:59:31 11 property of that size?

10:59:32 12 A. That, again, I can't say with any certainty.  
10:59:34 13 The \$200,000 figure that was quoted here seems awful  
10:59:39 14 high for digging a pond.

10:59:40 15 Q. But you're not sure?

10:59:41 16 A. Again, I'm not sure. We would have to design it  
10:59:46 17 and bid it.

11:00:13 18 Q. You deal with fill dirt all the time, right?

11:00:15 19 A. Yes, quite a bit.

11:00:18 20 Q. Can you give the jury a ballpark number of what a  
11:00:24 21 cubic yard of fill dirt would cost to have hauled, you  
11:00:31 22 know, ten cubic yards, tandem trucks?

11:00:35 23 A. What type of fill dirt?

11:00:37 24 Q. Well, fill dirt that would come from the bottom  
11:00:39 25 of a ditch.

11:00:40 1 A. So topsoil?

11:00:41 2 Q. Not topsoil, regular fill dirt.

11:00:43 3 A. Regular fill dirt, meaning clay, could range  
11:00:47 4 anywhere from five dollars a cubic yard to \$30 a cubic  
11:00:51 5 yard, depending on where it came from, how far away, and  
11:00:54 6 what the trucking costs were.

11:00:55 7 Q. And what about topsoil?

11:00:57 8 A. Topsoil, that varies depending, again, upon your  
11:01:03 9 location and availability. Particular clients that I  
11:01:07 10 have down in Findlay, they're selling it for around \$15  
11:01:11 11 to \$20 a cubic yard.

11:01:13 12 Q. Fifteen to 20 delivered?

11:01:17 13 A. Delivered, yes.

11:01:27 14 Q. So if our arborist suggested that we put on the  
11:01:35 15 back of these lots topsoil before planting trees to put  
11:01:45 16 back the foliage that was taken out, and I wanted to use  
11:01:51 17 a space, let's say, ten feet wide, nine feet high, then  
11:01:58 18 slope it, would I -- the multiplication would be ten  
11:02:03 19 feet times nine feet high times the length of the lot,  
11:02:14 20 correct? Then I would get cubic feet?

11:02:20 21 A. That would give you cubic feet down the center.  
11:02:23 22 That wouldn't account for your taper.

11:02:26 23 Q. Then I would divide the cubic feet by 27 --

11:02:29 24 A. 27.

11:02:30 25 Q. -- to get the number of cubic yards per lot?



11:02:33 1 A. Yes.

11:02:35 2 MR. ROBON: No further questions, Your  
11:02:38 3 Honor.

11:02:38 4 THE COURT: Redirect?

11:02:39 5 MR. BAHRET: Just a couple.

11:02:42 6 - - -

11:02:44 7 TODD JENKINS, REDIRECT EXAMINATION

11:02:45 8 BY MR. BAHRET:

11:02:45 9 Q. You were asked some questions by counsel about  
11:02:50 10 the diversion of water from the railroad right-of-way  
11:02:53 11 because it sits higher than the subdivision. Do you  
11:02:56 12 remember that?

11:02:56 13 A. Yes.

11:02:57 14 Q. Would you agree with me that the amount of water  
11:03:02 15 diverted is not going to be dependent upon how much  
11:03:06 16 higher that right of way is?

11:03:09 17 A. Yes, I would agree.

11:03:10 18 Q. I mean, if I have a two-story house versus a  
11:03:14 19 one-story house with the same size roof, exactly the  
11:03:17 20 same amount of water hits it, one-story, two-story  
11:03:21 21 doesn't matter?

11:03:21 22 A. That's correct.

11:03:22 23 Q. And it's going to go down the downspout at the  
11:03:26 24 same place whether it's a one-story house or two-story  
11:03:29 25 house?

11:03:29 1 A. Yes.

11:03:30 2 Q. And so if the railroad right-of-way got higher,  
11:03:34 3 that, in and of itself, has no effect at all on  
11:03:40 4 Cambridge Subdivision water-wise?

11:03:41 5 A. Provided the direction of the slope off of that  
11:03:44 6 surface wasn't changed, that's correct.

11:03:46 7 Q. And the direction before when you did the plan  
11:03:49 8 was towards Cambridge?

11:03:50 9 A. Yes. There was a portion that came towards  
11:03:53 10 Cambridge.

11:03:54 11 Q. Now, you were asked some questions about the area  
11:04:04 12 behind lot 16 here. Do you remember the discussion  
11:04:14 13 with Mr. Robon about putting a pipe in here?

11:04:19 14 A. Yes.

11:04:21 15 Q. Now, if I knock a hole in the side of the  
11:04:24 16 railroad drain and put an open pipe from that to the  
11:04:29 17 back of lot 16, would that increase my chances of  
11:04:33 18 getting a pond on lot 16?

11:04:34 19 A. Yes, it would.

11:04:35 20 Q. Would that be anything that you as a drainage  
11:04:39 21 engineer would ever have recommended somebody do?

11:04:42 22 A. No, it is not.

11:04:50 23 Q. It is, in fact, likely that that is a cause of  
11:04:53 24 ponding behind lot 16 if that is true, that the man  
11:04:56 25 knocked a hole in the side of a drainage line?

11:04:59 1 A. That is possible.

11:05:01 2 Q. In fact, would you recommend that somebody,  
11:05:05 3 somebody who had knocked the hole in it to begin with,  
11:05:08 4 fix it?

11:05:09 5 A. Yes, I would.

11:05:12 6 Q. Would you agree with me, sir, that that crossover  
11:05:15 7 pipe that there was some discussion about, the line that  
11:05:17 8 was severed.

11:05:18 9 A. Yes.

11:05:19 10 Q. If a pipe is full of dirt, is it going to serve  
11:05:25 11 its function?

11:05:27 12 A. Not if it's full of dirt, no.

11:05:29 13 Q. And if a pipe is full of dirt, then it's not  
11:05:32 14 moving water anywhere?

11:05:33 15 A. Correct.

11:05:35 16 MR. BAHRET: Thank you. I have no other  
11:05:37 17 questions.

11:05:41 18 - - -

11:05:41 19 TODD JENKINS, RECROSS-EXAMINATION

11:05:42 20 BY MR. ROBON:

11:05:42 21 Q. If the pipe on lot 16 that's cut into the  
11:05:46 22 railroad drain is sealed, where would the railroad water  
11:05:52 23 go that's in the railroad pipe? There's no longer a  
11:05:57 24 manhole or an exit. Wouldn't it just pond up at the  
11:06:01 25 ends of the pipe?

11:06:02 1 A. That would be the logical place for it, yes.

11:06:09 2 Q. Would you come over here again, please. So the  
11:06:21 3 pipe that is right here, if that is terminated, then the  
11:06:24 4 water is either going to pond here, here, or here  
11:06:28 5 (motioning) on the back of these lots, correct, because  
11:06:31 6 it has no place to go?

11:06:33 7 A. It would pond at the end of the pipe, then  
11:06:35 8 wherever the lowest place was, it would overflow into  
11:06:39 9 the lowest place.

11:06:40 10 Q. So it would either overflow here and run back  
11:06:43 11 this way, overflow here and run this way, or overflow  
11:06:46 12 here and run this way?

11:06:47 13 A. If, indeed, the ground between the railroad and  
11:06:50 14 that is higher, then yes, that would be the direction.

11:06:56 15 MR. ROBON: Thank you. Nothing further.

11:06:57 16 THE COURT: You're all done. And you don't  
11:07:00 17 even have to go all the way back.

11:07:04 18 Defendant may call its next witness.

11:07:09 19 MR. BAHRET: They're in the room at the end  
11:07:11 20 of the hall. I'll run down there.

11:07:25 21 THE COURT: Jury, you may stand up and  
11:07:27 22 wiggle if you want. The witnesses are being kept in a  
11:07:30 23 room down the hall. It may take a minute.

08:37:30 24 (The witness was sworn by the clerk.)

08:37:30 25 - - -

08:37:30 1 TIMOTHY PAULEY, DIRECT EXAMINATION

08:37:30 2 BY MR. BAHRET:

11:08:38 3 Q. Sir, could you state your full name.

11:08:40 4 A. Timothy Bennett Pauley.

11:08:41 5 Q. Tell us how old you are and your educational  
11:08:44 6 background.

11:08:44 7 A. I'm 39 years old. I started with civil  
11:08:47 8 engineering design in high school, continued my  
11:08:53 9 education through high school into community college  
11:08:57 10 through architectural civil engineering, mechanical  
11:09:01 11 drafting. I started out, wanted to be a design  
11:09:07 12 drafter. Started for the county as a rod man because I  
11:09:13 13 found out the easiest way to be a drafter is to get some  
11:09:17 14 survey experience and transfer. Started surveying for  
11:09:21 15 Lucas County.

11:09:23 16 Q. About how long ago was that?

11:09:24 17 A. That was in '92 I think I started with the  
11:09:30 18 county.

11:09:31 19 Q. Okay.

11:09:32 20 A. As a rod man, eight dollars an hour, learning  
11:09:36 21 what everything was.

11:09:37 22 Q. What is a rod man?

11:09:38 23 A. Rod man is the base step in surveying. You  
11:09:42 24 control the dumb end of the tape, which is if you're  
11:09:47 25 reading a measurement, you start at zero, and you go to

11:09:49 1 whatever the final measurement is. I was the zero guy.  
11:09:53 2 I was never on because I was always holding zero. I  
11:09:57 3 worked there for four years, worked my way up to an  
11:10:00 4 instrument operator, which is the smart guy; he's the  
11:10:04 5 one that reads the actual number. You do everything  
11:10:08 6 from steel tapes to rulers to nowadays you're dealing  
11:10:13 7 with EDMs, which is electronic distance measurement, and  
11:10:18 8 GPS units.

11:10:20 9 Q. And GPS, for the jury, are global positioning?

11:10:24 10 A. Correct.

11:10:25 11 Q. Who do you work for now?

11:10:27 12 A. I work for the City of Toledo Engineering  
11:10:28 13 Services under the Department of Public Utilities.

11:10:31 14 Q. And what is your role in that department?

11:10:33 15 A. I am currently a senior engineering aid, which is  
11:10:38 16 a level 3 -- I'm not a licensed surveyor, but I operate  
11:10:47 17 all the equipment and collect the data that's provided  
11:10:51 18 to a licensed surveyor to determine boundaries,  
11:10:56 19 location.

11:10:58 20 Q. Who's that?

11:10:59 21 A. Robert Babcock.

11:11:00 22 Q. He's your supervisor?

11:11:02 23 A. That's correct.

11:11:03 24 Q. And how long have you been with Toledo?

11:11:06 25 A. I've been with the City of Toledo for seven years

11:11:10 1 come August.

11:11:11 2 Q. Did you have any involvement in the surveying for  
11:11:16 3 the railroad right of way that's the Toledo water  
11:11:19 4 project in 2006?

11:11:21 5 A. I did not do the initial survey, the gathering of  
11:11:24 6 the information for the railroad or its right-of-way.

11:11:28 7 Q. Did you have anything to do with marking the  
11:11:33 8 right-of-way lines?

11:11:34 9 A. Yes.

11:11:35 10 Q. What was your role?

11:11:36 11 A. My role was to determine the clearing area and  
11:11:41 12 the public right-of-way for a stretch of nine miles,  
11:11:45 13 which was the beginning of the job to the end of the  
11:11:48 14 job.

11:11:48 15 Q. Now let's explain to the jury when you said you  
11:11:52 16 were not part of the initial calculations, was that done  
11:11:55 17 by Arcadis?

11:11:56 18 A. I Believe so. All the plans had the Arcadis  
11:12:02 19 stamp on there. Whether they had a contractor that did  
11:12:04 20 the information for them and they calculated it, I don't  
11:12:07 21 know, but the plans I've seen have been labeled Arcadis.

11:12:10 22 Q. So the information saying whatever -- well, tell  
11:12:13 23 us, how is that information conveyed from a written plan  
11:12:16 24 to you so you know how to put a survey stake --

11:12:20 25 MR. ROBON: Your Honor, can we approach the

11:12:21 1 bench, please?

11:12:22 2 THE COURT: Sure.

11:12:24 3 (Discussion had off the record.)

11:13:18 4 BY MR. BAHRET:

11:13:18 5 Q. Go ahead, Mr. Pauley, tell us, how does the  
11:13:21 6 information come to you so you might know where to put a  
11:13:24 7 marking?

11:13:24 8 MR. ROBON: Show an objection, Your Honor.

11:13:26 9 THE COURT: Overruled.

11:13:27 10 BY MR. BAHRET:

11:13:27 11 A. I'm given a series of points that are called  
11:13:31 12 control. What they are are points previously set up on  
11:13:36 13 the job. We can call one of them 1 and the other one 2.  
11:13:40 14 You set up on point number 1. You look through a  
11:13:43 15 telescope basically at number 2 and determine a bearing  
11:13:47 16 off of that. You set at zero, then you can determine  
11:13:49 17 where everything else is based off those two primary  
11:13:52 18 control points. Through that job I localized through  
11:13:58 19 GPS approximately 23 control points. Those control  
11:14:02 20 points are in direct relation to the railroad property  
11:14:06 21 and outlining public right-of-way, which that's what we  
11:14:11 22 do is we find the public right-of-way for the City of  
11:14:15 23 Toledo to build in and not encroach upon other plans.  
11:14:20 24 MR. ROBON: I move to strike. He's not a  
11:14:22 25 registered surveyor.



11:14:35 1 THE COURT: I'm going to overrule. The  
11:14:37 2 question was, What information is given to you for you  
11:14:40 3 to mark. He answered that question. I don't think you  
11:14:43 4 need to be a registered surveyor to answer that  
11:14:46 5 question, so I'll overrule it.

11:14:48 6 MR. BAHRET: Thank you.

11:14:49 7 BY MR. BAHRET:

11:14:49 8 Q. Mr. Pauley, you were working under the  
11:14:52 9 supervision of a registered surveyor?

11:14:55 10 A. Two. And under licensed engineers also in the  
11:14:58 11 design and construction.

11:14:59 12 Q. And you were under their supervision during this  
11:15:01 13 project?

11:15:02 14 A. Yes.

11:15:02 15 Q. Consult with them during this project?

11:15:04 16 A. Every day.

11:15:08 17 Q. Tell us, did you have any part in the marking of  
11:15:11 18 the property line behind what we now know as Cambridge?

11:15:15 19 A. Yes. I have primary control of that.

11:15:17 20 Q. Could you describe what you did and how you did  
11:15:20 21 it?

11:15:20 22 A. Based on the control points that we set up  
11:15:23 23 through GPS, then it is determined by a licensed  
11:15:27 24 surveyor where the property lines should fall along the  
11:15:31 25 railroad. I'm given coordinates for an offset from my

11:15:37 1 control points to that right-of-way. So I take the GPS  
11:15:40 2 unit out and stakeout that property line per  
11:15:46 3 calculation, and it says, okay, based on where you are,  
11:15:49 4 and you're 23 feet off of it or 40 feet off of it, so  
11:15:53 5 you take a measurement with a steel tape and measure  
11:15:57 6 perpendicular to that line, and then you mark at that  
11:16:01 7 line with ribbon -- well, per that job because that was  
11:16:04 8 for clearing.

11:16:05 9 Q. This GPS device that you're talking about, is  
11:16:09 10 that a handheld unit?

11:16:11 11 A. No, this is -- no, a handheld unit, GPS unit that  
11:16:15 12 boaters use or golfers use can run from maybe \$500 to  
11:16:19 13 \$600 to \$1,000 in price. The unit I was operating is a  
11:16:24 14 \$40,000 professional GPS unit that measures  
11:16:29 15 subcentimeter.

11:16:30 16 Q. It measures what?

11:16:31 17 A. Subcentimeter. It's greatest error would be a  
11:16:35 18 cubic centimeter, and that would be its greatest error.

11:16:39 19 Q. And how big is this device, and how do you  
11:16:43 20 transport it?

11:16:44 21 A. Well, I don't know if anybody has any dealing  
11:16:49 22 with survey equipment, but it looks pretty much like a  
11:16:52 23 standard survey rod. It's two meters in height. It  
11:16:55 24 has about a ten-inch diameter disk on top that is a GPS  
11:17:01 25 receive. It receives satellite signals from the GPS

11:17:05 1 satelllites that orbit the world.

11:17:08 2 Q. So when you position it and you determine within  
11:17:12 3 a centimeter or less where you are in the world --

11:17:16 4 A. Uh-huh.

11:17:17 5 Q. -- and measure from there to --

11:17:19 6 A. A coordinated point, this one being the  
11:17:22 7 right-of-way of the railroad.

11:17:24 8 MR. ROBON: Show an objection again, Your  
11:17:26 9 Honor. We're talking about surveying. He's not  
11:17:29 10 registered.

11:17:30 11 THE COURT: Overruled.

11:17:31 12 Q. And for purposes of explanation, a centimeter is  
11:17:36 13 how big?

11:17:39 14 A. Well, it would be less than a quarter of an inch.

11:17:44 15 Q. All right. Now, the -- you mentioned ribbons.  
11:17:48 16 Tell us about that.

11:17:49 17 A. A flagging ribbon. It's one to three-quarters  
11:17:53 18 of an inch wide. Nonadhesive tape, comes in various  
11:17:58 19 colors: pink, red, blue, orange, white. It's used to  
11:18:04 20 mark different things: waterline, electrical,  
11:18:07 21 right-of-way.

11:18:08 22 Q. Do you remember what color was in use?

11:18:10 23 A. Through that section, no, I don't. Because we  
11:18:12 24 used two different kinds, and I am color blind. We used  
11:18:16 25 pink and orange. Through that section I believe we

11:18:19 1 used orange.

11:18:19 2 Q. So somebody else picks out the color for you?

11:18:22 3 A. The licensed surveyor actually has the ribbon on  
11:18:25 4 his hand because I'm doing the data collection of it and  
11:18:28 5 keeping track of where we are. Then he actually sets  
11:18:30 6 the physical point in the field.

11:18:34 7 Q. But he actually sets the physical point means  
11:18:37 8 what?

11:18:37 9 A. He ties the ribbon on the boundary of our area.

11:18:42 10 Q. Now, behind Cambridge did you encounter any sort  
11:18:45 11 of fencing?

11:18:47 12 A. Yes.

11:18:48 13 Q. Tell us about that.

11:18:50 14 A. Cambridge had a railroad tie fence -- well, it  
11:18:56 15 was more of a retaining wall with, like, a bar type --  
11:19:00 16 the bar fence coming out of the top of it. It was  
11:19:03 17 constructed with wire fencing to tie the posts together.  
11:19:07 18 That was in, surveying, poor condition, which meant that  
11:19:12 19 less than 90 percent of the fence was upright.

11:19:16 20 Q. Less than 90 percent was upright? So over ten  
11:19:20 21 percent was down?

11:19:21 22 A. Yes.

11:19:21 23 Q. Okay. But you could still see the fence?

11:19:24 24 A. Uh-huh.

11:19:25 25 Q. That's a yes for the record?

11:19:27 1 A. Yes. Correct. Sorry.

11:19:29 2 Q. Now, was there ever any conflict between the  
11:19:35 3 documentation supplied by Arcadis as to where a boundary  
11:19:40 4 would be and that railroad fence?

11:19:42 5 A. Conflict, no. Was there a discrepancy between  
11:19:46 6 the two in the field, yes. But the fence was outside  
11:19:51 7 of the right of way for the railroad. So what happened  
11:19:56 8 is the fence had been, over the years, pushed away from  
11:19:59 9 the railroad. It was obvious, the bottom -- it was  
11:20:03 10 leaning over to what I would call the west side of the  
11:20:06 11 project. If you were to stand that fence up  
11:20:10 12 vertically, as if it was new, that is where we placed  
11:20:15 13 our survey ribbon, which we called occupation.

11:20:20 14 Q. What's that mean, occupation?

11:20:21 15 A. Occupation is when you run into a fence, if the  
11:20:25 16 right-of-way would have said your right-of-way line is  
11:20:30 17 20 feet away, but I measured over 19 feet away, and I  
11:20:34 18 found a fence, that's determining occupation. So I  
11:20:36 19 wouldn't go beyond that fence mark and say, well, the  
11:20:41 20 right-of-way for the railroad is 25 feet, even though I  
11:20:45 21 hit a fence at 20 feet. I would stay inside of the  
11:20:48 22 railroad's occupational or visual right-of-way that they  
11:20:51 23 owned, what they've maintained.

11:20:54 24 Q. All right. And when you staked, did you -- or  
11:20:58 25 not staked; tied ribs on. It was Mr. Babcock that tied

11:21:03 1 ribbons?

11:21:04 2 A. Nick Ronau.

11:21:05 3 Q. Did Nick, did he tie those ribbons just on the  
11:21:09 4 railroad fence?

11:21:10 5 A. They were tied to trees on ground shrub.

11:21:16 6 Q. And what is Nick Ronau's job?

11:21:19 7 A. He's a licensed surveyor, my infield supervisor.

11:21:23 8 Q. Okay. And were you working as a two-man team or  
11:21:27 9 one?

11:21:27 10 A. Two-man crew.

11:21:28 11 Q. So Nick was your direct supervisor?

11:21:30 12 A. Uh-huh.

11:21:31 13 Q. That's a yes for the record?

11:21:33 14 A. Yes.

11:21:34 15 Q. And then Mr. Babcock is your boss?

11:21:38 16 A. He's our supervisor of surveyors. So he  
11:21:42 17 controls the whole department. Nick and I were out on a  
11:21:45 18 separate team that day.

11:21:47 19 Q. So your role is simply to identify as best you  
11:21:50 20 can where the boundary is?

11:21:52 21 A. Yes.

11:21:52 22 Q. And did you do that?

11:21:54 23 A. Yes.

11:21:56 24 Q. Did that pretty much end your involvement, or did  
11:21:59 25 you ever have more involvement?

11:22:01 1 A. No, I've had ongoing involvement with that  
11:22:04 2 particular stretch.

11:22:06 3 Q. And what other involvement did you have?

11:22:08 4 A. I was sent back out with Nick Ronau again to do a  
11:22:15 5 topographical survey of the area. I have to do a  
11:22:20 6 localization physically of fences, trees, public  
11:22:22 7 utilities, any kind of electrical, pedestals, ground  
11:22:31 8 contours, drainage, a complete survey of anything you  
11:22:35 9 would observe without digging in the field.

11:22:39 10 Q. Do you know what the purpose for that was?

11:22:42 11 A. At the time I was told that it was to determine  
11:22:46 12 the boundary of the subdivision.

11:22:49 13 Q. And did you collect data?

11:22:51 14 A. Yes.

11:22:51 15 Q. And to whom did you submit the data that you  
11:22:55 16 collected?

11:22:55 17 A. Robert Babcock.

11:22:57 18 Q. And to your knowledge did he then prepare certain  
11:23:00 19 diagrams and documents?

11:23:02 20 A. It was brought into a CAD file and printed out  
11:23:06 21 for observation.

11:23:07 22 Q. When you say brought into a CAD file --

11:23:09 23 A. That's the translation between the electrical and  
11:23:12 24 GPS positioning data that I collect in the field and a  
11:23:15 25 hard copy, a drawing, something physical you can look at

11:23:19 1 in front of you.

11:23:20 2 Q. Did you also have any involvement in analyzing a  
11:23:24 3 certain sewer -- not sewer, manhole?

11:23:28 4 A. Yes, we located all the drainage structures in  
11:23:31 5 that stretch.

11:23:34 6 Q. And did you have occasion -- first of all, who  
11:23:45 7 was with you when you went back out to measure the  
11:23:48 8 manhole?

11:23:49 9 MR. ROBON: Could we have a timeframe, Mr.  
11:23:51 10 Bahret?

11:23:53 11 THE COURT: When did you go out and perform  
11:23:55 12 this?

11:23:55 13 THE WITNESS: This was done immediately  
11:23:58 14 after the topographical survey of the area, within a  
11:24:03 15 one- or two-day period.

11:24:05 16 THE COURT: And your topo was done when,  
11:24:07 17 approximately?

11:24:09 18 MR. BAHRET: I can give him the exact date  
11:24:12 19 on the document if you'd like.

11:24:15 20 BY MR. BAHRET:

11:24:16 21 Q. Let me show you Exhibit K. There's a date up  
11:24:18 22 there?

11:24:18 23 A. 10-24 of '06. That's correct.

11:24:22 24 Q. And do you recognize what Exhibit K is?

11:24:24 25 A. This is a standard inventory sheet for a manhole.



11:24:30 1 Q. And does that have information on it where one  
11:24:36 2 could calculate the depth of pipe in it?

11:24:39 3 A. Yes.

11:24:42 4 Q. Are you able to provide that information from  
11:24:44 5 that diagram?

11:24:45 6 A. Yes, I can read that diagram and interpret that.

11:24:48 7 Q. And who prepared that? Was that you?

11:24:51 8 A. This was Nick. N.F.R. is Nicholas Franklin -- I  
11:24:57 9 think his middle name is Franklin -- Ronau. And T.B.P.,  
11:25:01 10 Timothy Bennett Pauley below that.

11:25:03 11 Q. What was your role in that manhole investigation,  
11:25:07 12 if you will?

11:25:10 13 A. I would provide the information that Nick would  
11:25:13 14 write down on the sheet, being the measurements.

11:25:16 15 Q. So you were the man actually measuring?

11:25:18 16 A. Yes.

11:25:19 17 Q. Tell us the technique. What did you do to  
11:25:22 18 measure?

11:25:22 19 A. You take -- within this example, this is a  
11:25:24 20 manhole. You pull the lid off and you take a ruler, or  
11:25:29 21 in some cases a rod if it's longer than six feet because  
11:25:34 22 our rulers only go up to six feet. If it's longer than  
11:25:37 23 that you use a rod. I noticed in here that there are  
11:25:41 24 measurements over six feet. So we most likely used a  
11:25:45 25 fiberglass rod with measurements on that. You measure

11:25:50 1 the rim, the top of the manhole right down to the invert  
11:25:53 2 of whatever points may be inside and the bottom of the  
11:25:58 3 structure itself, being concrete or stone.

11:26:01 4 Q. Help me understand what you're getting at. Are  
11:26:04 5 you getting the top and bottom of the pipe?

11:26:06 6 A. When you first do the topographical survey you  
11:26:09 7 don't open the manhole up. You take a shot on the  
11:26:12 8 manhole lid itself; that's assigned an elevation. I'm  
11:26:19 9 seeing in this diagram here the rim elevation was equal  
11:26:23 10 to 618.99 feet. And from that 618.99 the bottom  
11:26:32 11 measured a negative 6.65 feet. So from there down to  
11:26:37 12 the bottom of the structure was 6.65 feet. That's  
11:26:41 13 usually calculate by the drafters in the office. We  
11:26:45 14 just write down the measurements of what they are and  
11:26:47 15 report those.

11:26:48 16 Q. And those numbers, would that be above sea level?  
11:26:51 17 Is that 618 -- what is that?

11:26:54 18 A. That is in relation to the entire project. It  
11:26:59 19 doesn't mean that the datum was directly taken off of  
11:27:04 20 mean sea level. Most likely it was. But that just  
11:27:09 21 gives us a datum to refer to every other elevation  
11:27:13 22 throughout the entire project, which was the nine miles.

11:27:15 23 Q. And are there other measurements on that  
11:27:18 24 document?

11:27:18 25 A. Yes, there are.

11:27:19 1 Q. What others?

11:27:20 2 A. There's -- I usually don't have to read Nick's  
11:27:27 3 writing. There's an initial measurement as negative  
11:27:31 4 6.30 that has -- I would call north by northwest. And  
11:27:40 5 a 24-inch, that would be heading almost due east with a  
11:27:48 6 negative 6.60. That would be to the invert of a pipe.

11:27:53 7 Q. Is that 24-inch one the one that would be going  
11:27:56 8 under the abandoned railroad right-of-way?

11:27:59 9 A. Yes. Correct.

11:28:02 10 Q. And the 6.6 is to what part of that pipe?

11:28:05 11 A. The invert of the pipe. Say the pipe is round;  
11:28:10 12 the invert would be the bottom of the U; the lowest  
11:28:14 13 point of the structure.

11:28:15 14 Q. So the very bottom of the pipe was six and a half  
11:28:18 15 feet below the rim?

11:28:19 16 A. 6.60. Correct. That's in engineering. So  
11:28:23 17 it's not six and a half feet; it's 6.6 feet, which is  
11:28:28 18 slightly over six and a half feet.

11:28:30 19 Q. That was clear as mud.

11:28:32 20 A. Six and a half feet would be 6.5. 6.6 is another  
11:28:38 21 tenth.

11:28:41 22 Q. I'm with you. Are there other measurements in  
11:28:44 23 there?

11:28:44 24 A. Yes, there are.

11:28:45 25 THE COURT: Are there a going to be a lot of

11:28:48 1 measurements? It might be helpful for the jury to have  
11:28:52 2 it on the screen and have him talk about it.

11:28:54 3 MR. BAHRET: Let me take this from you, Mr.  
11:28:56 4 Pauley. It will show up on your screen right her if I  
11:29:00 5 do this right.

11:29:33 6 (Discussion had off the record.)

11:29:33 7 THE COURT: Counsel will be staying after  
11:29:36 8 class today for a remedial session -- both counsel.

11:29:45 9 MR. ROBON: Find somebody that knows how to  
11:29:48 10 work it, Judge.

11:29:49 11 MR. BAHRET: I deserved that.

11:29:51 12 BY MR. BAHRET:

11:29:51 13 Q. Sir, if you need to touch the screen, do you have  
11:29:54 14 a pen or something to touch it?

11:29:59 15 THE COURT: Use your finger.

11:30:02 16 Q. If you touch it -- let me see if I do this right.  
11:30:06 17 Do you see it makes a -- that thing?

11:30:09 18 A. Uh-huh.

11:30:10 19 Q. And then if you touch the lower right corner of  
11:30:13 20 the screen it will erase that. So if you want to  
11:30:15 21 highlight something for the jury, you can do that.

11:30:19 22 A. Sure.

11:30:19 23 Q. Tell us, real quickly go through which one of  
11:30:24 24 these lines represents, if any, that crossover pipe  
11:30:28 25 we're talking about.

11:30:30 1 A. The end of that line there, the negative 6.60.  
11:30:35 2 If you notice next to that there's a circle, 6.1. -- I  
11:30:40 3 believe 39. Then 24 with an inch mark. That labels  
11:30:44 4 the pipe as a 24 inch. And the 6.1239 is probably the  
11:30:50 5 invert elevation.

11:30:52 6 Q. So this right here, this 24?

11:30:55 7 A. That's correct.

11:31:01 8 Q. With reference to the identification of the depth  
11:31:04 9 of that crossover pipe, have you talked about all the  
11:31:07 10 measurements we need to know, or are there more?

11:31:09 11 A. There are more. On this sheet I do not believe  
11:31:12 12 they're listed. That negative 6.60 would be the  
11:31:18 13 elevation of the pipe inside of the structure, the  
11:31:21 14 manhole. There's another end of the pipe. If you  
11:31:26 15 were to take this line and extend it out, there's  
11:31:29 16 another end, and that would have its own specific  
11:31:32 17 elevation of the outlet of that pipe.

11:31:34 18 Q. Did you find the outlet to that pipe?

11:31:37 19 A. I believe so.

11:31:38 20 Q. And do you recall, was it the same elevation?  
11:31:43 21 Could you tell if it was going up or down?

11:31:46 22 A. I don't have that information with me. I know  
11:31:48 23 it was reported and given to, I believe, the engineer.

11:31:53 24 Q. When you say the engineer, who's that?

11:31:55 25 A. Christy Soncrant.

11:31:59 1 Q. All right. Are there any other measurements on  
11:32:02 2 here that would help us understand that 24-inch pipe any  
11:32:07 3 better?

11:32:08 4 A. No, not necessarily. The only thing that's not  
11:32:13 5 written on here is the condition of the structure, which  
11:32:16 6 at the time was very poor. I believe there was  
11:32:20 7 actually portions of it exposed. And I believe the  
11:32:25 8 structure was reconstructed. But I'm not entirely  
11:32:29 9 positive.

11:32:29 10 Q. When you're saying the structure was  
11:32:32 11 reconstructed, you mean this manhole?

11:32:34 12 A. Yes.

11:32:35 13 Q. All right. Did that end your involvement in the  
11:32:40 14 investigation, if you want to call it that, in this  
11:32:43 15 case?

11:32:43 16 A. As far as physically gathering information, I  
11:32:46 17 believe so, yes.

11:32:48 18 Q. All right. Did you participate in any resurvey  
11:32:56 19 after there was a complaint about an alleged trespass?

11:33:02 20 A. There was information in the field verified.  
11:33:06 21 But I don't recall storing any of that information. We  
11:33:11 22 went back out. We looked at the area. I think we took  
11:33:15 23 some grade shots. I don't think that I recorded any  
11:33:19 24 information myself. Nick might have, but I didn't  
11:33:26 25 compile any information off that.

11:33:29 1 Q. Okay. From what you -- when you went back out,  
11:33:34 2 did you determine whether there was or was not any sort  
11:33:39 3 of an encroachment, or was that not your task?

11:33:43 4 MR. ROBON: Objection.

11:33:44 5 THE COURT: That can be answered yes or no.  
11:33:46 6 The objection is overruled.

11:33:48 7 MR. ROBON: I'm objecting; he's giving a  
11:33:50 8 professional opinion.

11:33:51 9 THE COURT: He hasn't yet. Let's hear what  
11:33:52 10 the answer is. The answer can require a simple yes or  
11:33:55 11 no. The question was, when you went back out, did you  
11:33:58 12 determine whether there was or was not any sort of  
11:34:01 13 encroachment, or was that not your task:

11:34:04 14 A. No, that was not my task.

11:34:06 15 Q. Was that Mr. Babcock?

11:34:07 16 A. That's correct.

11:34:15 17 MR. BAHRET: Thank you. No other questions.

11:34:19 18 - - -

11:34:19 19 TIMOTHY PAULEY, CROSS-EXAMINATION

11:34:20 20 BY MR. ROBON:

11:34:20 21 Q. Sir, I did not catch your name?

11:34:22 22 A. Timothy Pauley, P-a-u-l-e-y.

11:34:39 23 Q. Can you tell this jury whether any outside  
11:34:42 24 engineer or surveyor was retained by the City once there  
11:34:45 25 was a dispute about the property line or the cutting of

11:34:49 1 the storm drainage?

11:34:53 2 A. Not to my knowledge.

11:34:54 3 Q. All City employees -- the City regularly uses  
11:35:02 4 outside surveyors and outside engineers; does it not?

11:35:06 5 A. Not in the seven years I've been employed with  
11:35:08 6 the City of Toledo.

11:35:09 7 Q. Well, didn't they use Arcadis to draw the plans?

11:35:13 8 A. I believe that was prior to the seven years I was  
11:35:15 9 employed.

11:35:16 10 Q. So during the last seven years they don't use any  
11:35:18 11 outside --

11:35:19 12 A. Minimal.

11:35:20 13 Q. -- engineers or surveyors?

11:35:23 14 A. Minimal.

11:35:23 15 Q. Okay. I want you to take a look at Exhibit K.  
11:35:29 16 And I note up here that this has a date of October 24,  
11:35:38 17 '06, which is six months after the cutting of the pipe  
11:35:42 18 and the trees.

11:35:45 19 MR. BAHRET: That's not true.

11:35:46 20 A. That's not true. That pipe couldn't have been  
11:35:48 21 cut or I wouldn't have taken a measurement on it.

11:35:55 22 Q. What's not true?

11:35:57 23 A. That that's after the date.

11:35:59 24 Q. Well, is this date the date that you took this  
11:36:02 25 information, October 24 of '06?



11:36:06 1 A. That's the date the paper was submitted.

11:36:09 2 Q. Well, my question is, the evidence has been that  
11:36:16 3 66-inch water main was installed in the summer or late  
11:36:19 4 spring of 2006.

11:36:23 5 A. Through that section? I didn't write down the  
11:36:28 6 date of the pipe installation. It was nine miles.  
11:36:34 7 That was one section.

11:36:35 8 Q. Well, this -- the evidence -- I think it's  
11:36:39 9 unquestioned that in the late spring, early summer,  
11:36:41 10 sometime in June or July, maybe even the first part of  
11:36:45 11 August, between White and Ford and Bates Road, that big  
11:36:49 12 pipe was put in. Are you disputing that?

11:36:53 13 A. No.

11:36:53 14 Q. Well, my question is, how in the world could you  
11:36:57 15 measure the end of the 24 inch pipe if it was severed?

11:37:04 16 A. If it was inside that structure, it wasn't  
11:37:07 17 severed. It was still a part of that structure.

11:37:10 18 Q. I understand that. But when I saw you talking  
11:37:13 19 about it going down here, you said you measured the  
11:37:19 20 other end.

11:37:20 21 A. At one time, yes.

11:37:21 22 Q. Well, would you tell the jury how you measured  
11:37:24 23 that other end. Did you dig up the end of the pipe and  
11:37:28 24 find the bulkhead?

11:37:29 25 A. No. And the other end of the pipe was exposed

11:37:32 1 pipe on the drainage swale of the railroad property.

11:37:37 2 It was an exposed pipe.

11:37:39 3 Q. So you actually found the other end in the  
11:37:46 4 railroad drainage ditch?

11:37:48 5 A. I believe that information was collected, yes.

11:37:55 6 Q. My goodness. Could you come over here, please.

11:38:12 7 This is a map of the area. Would you stand over  
11:38:16 8 here so the jury can see. This is the manhole you're  
11:38:24 9 talking about, correct? It's a little bit behind the  
11:38:27 10 Cambridge subdivision?

11:38:29 11 A. I don't know what that distance is.

11:38:32 12 THE COURT: Give him the microphone, please.

11:38:34 13 A. I'm not sure what that distance is that he's  
11:38:38 14 showing me between there. It quite possibly could be.

11:39:07 15 (Discussion had off the record.)

11:39:08 16 THE WITNESS: I can speak up.

11:39:09 17 THE COURT: Thank you.

11:39:10 18 THE WITNESS: No problem.

11:39:20 19 BY MR. ROBON:

11:39:20 20 Q. This is the manhole that's been identified as the  
11:39:24 21 one that's been the subject of this lawsuit. And my  
11:39:27 22 question is: This is the other end that goes into the  
11:39:30 23 center line ditch. Is this the end that you actually  
11:39:34 24 found and measured?

11:39:35 25 A. I believe that's the end that I shot.

11:39:38 1 Q. Did you look through this?

11:39:41 2 A. No, I did not physically go down.

11:39:45 3 Q. What was the condition of the end here that you  
11:39:48 4 found in the ditch?

11:39:49 5 A. Concrete.

11:39:50 6 Q. Concrete. With a pipe?

11:39:55 7 A. Round pipe, concrete pipe.

11:39:58 8 Q. And when you looked into the manhole, when you  
11:40:03 9 took the lid off, was there water in the bottom?

11:40:06 10 A. I don't believe so.

11:40:10 11 Q. Was that in October of '06, or did you do it in  
11:40:14 12 September of '06?

11:40:15 13 A. The specific date of the measurement I'm not  
11:40:19 14 positive on.

11:40:23 15 Q. Did you know that that pipe was severed by the  
11:40:26 16 City contractor?

11:40:27 17 A. I know it was being questioned on whether or not  
11:40:30 18 the 66-inch pipe through that section was going to  
11:40:34 19 disturb that drainage pipe.

11:40:38 20 Q. Well, this is after the fact. Did you know that  
11:40:40 21 before the fact?

11:40:41 22 A. No, I did not know that before the fact.

11:40:46 23 Q. Well, you were out here after the City waterline  
11:40:49 24 was installed, right?

11:40:50 25 A. Correct.

11:40:53 1 Q. And nobody took a backhoe and dug this up, right?

11:40:58 2 A. The proposed pipe, the 66 inch?

11:41:01 3 Q. No. No. The 24-inch pipe.

11:41:04 4 A. Not in my presence.

11:41:06 5 Q. But what you did is you found one end here in the  
11:41:09 6 manhole, and then you found the other end over here in  
11:41:12 7 the ditch?

11:41:12 8 A. If that is the structure, I believe so.

11:41:19 9 Q. You can have a seat.

11:41:40 10 Is this a photograph, City of Toledo A13 -- my  
11:42:03 11 question to you is: This was identified, and it showed  
11:42:07 12 the cutting of the various tree stumps by the tree  
11:42:12 13 clearing company. And do you see the railroad fence  
11:42:16 14 right behind it?

11:42:18 15 A. Yes. I see a railroad tie.

11:42:22 16 Q. When you put your markings on, did you do an  
11:42:27 17 offset where you normally -- if you put a marking on a  
11:42:32 18 tree, the marking would remain after the cutting?

11:42:36 19 A. That's correct.

11:42:37 20 Q. Did you have offsets is my question? Do you  
11:42:41 21 know what I mean by offsets?

11:42:43 22 A. To the cut mark? I guess I'm not understanding  
11:42:46 23 your question. It was all offset, all the offsets --  
11:42:49 24 all the ribbon tied onto the trees were offsets.

11:42:52 25 Q. Okay. That's my question. How much of an

11:42:57 1 offset?

11:42:57 2 A. It would vary depending on what the right-of-way  
11:43:00 3 called for.

11:43:00 4 Q. So if there was a ribbon on a tree, that means  
11:43:05 5 that tree shouldn't be taken down; it should be -- they  
11:43:08 6 should clear up to one foot of it or two foot of it?

11:43:12 7 A. As long as that tree is still present they clear  
11:43:16 8 up to it.

11:43:16 9 Q. Up to it?

11:43:17 10 A. That's correct.

11:43:18 11 Q. So if the evidence is that they cut the trees  
11:43:21 12 where the ribbons were, they went too far?

11:43:25 13 A. Yes.

11:43:32 14 Q. When you were out there, will you tell the jury  
11:43:35 15 why there was no safety fence installed along the  
11:43:41 16 proposed cutting line?

11:43:43 17 A. No.

11:43:44 18 Q. Does the City use safety fences?

11:43:48 19 A. Yes.

11:43:49 20 Q. Do you recall that the brush and the brambles  
11:43:52 21 behind the Cambridge Subdivision were very thick?

11:43:58 22 A. Describe "very thick."

11:44:01 23 Q. Hard to walk through.

11:44:03 24 A. No, we did walk through them. That's how we  
11:44:07 25 placed the ribbon.

11:44:09 1 Q. Did you pull them aside?

11:44:10 2 A. In cases. Not necessarily you had to, but I'm  
11:44:13 3 not saying that we didn't move brush to traverse through  
11:44:16 4 that area.

11:44:17 5 Q. Did you cut some down?

11:44:19 6 A. No.

11:44:25 7 Q. Did you -- take a look at Exhibit 54. Did you  
11:44:30 8 find any monuments, corner monuments at the Cambridge  
11:44:35 9 Subdivision when you were doing your markings?

11:44:37 10 A. Yes, I found similar monumentation as pictured.

11:44:41 11 Q. Did you abide by those monuments?

11:44:45 12 A. For?

11:44:45 13 Q. For your posting of the ribbons?

11:44:51 14 A. Those were located posts after the ribbon had  
11:44:58 15 been placed for clearing.

11:45:01 16 Q. Maybe you don't understand my question. My  
11:45:04 17 question is: Is your ribbon behind this post or more  
11:45:10 18 away from the railroad, or was it on the line where  
11:45:13 19 these posts were?

11:45:15 20 A. I don't know what post that is. I don't know  
11:45:18 21 what its location is relative to the railroad. I used  
11:45:22 22 the railroad right-of-way to determine the clearing  
11:45:28 23 area.

11:45:28 24 Q. You didn't use this monument?

11:45:30 25 A. No.

11:45:30 1 Q. Did you see the monument when you were out there?

11:45:34 2 A. Not until after.

11:45:35 3 Q. So the two monuments at each end of the  
11:45:40 4 subdivision you just never saw?

11:45:41 5 A. They weren't located until there was a question  
11:45:44 6 about the clearing area. The length was insignificant  
11:45:51 7 for what my job scope was.

11:45:54 8 Q. What was insignificant?

11:45:56 9 A. I dealt with nine miles of project through here.

11:46:00 10 Q. So whether you were off a few inches, it didn't  
11:46:03 11 matter, or you didn't have to worry about looking for a  
11:46:06 12 survey monument?

11:46:07 13 A. Not through areas where occupation was clear.

11:46:10 14 Q. So when you say occupation, if the railroad fence  
11:46:14 15 was three feet onto the Cambridge property, that's where  
11:46:18 16 you marked the ribbon, right, on the railroad fence?

11:46:21 17 A. No.

11:46:22 18 Q. Well, you said occupation?

11:46:24 19 A. Only when it was in direct conflict with the  
11:46:28 20 right-of-way information I was given. The right-of-way  
11:46:31 21 information I was given would never allow me to go three  
11:46:34 22 feet beyond the public right-of-way -- or the railroad's  
11:46:37 23 right-of-way, I'm sorry.

11:46:39 24 Q. Sir, in this photograph you see the stake? Back  
11:46:49 25 here is the railroad fence. This stake is probably

11:46:54 1 three feet closer to the railroad.

11:46:58 2 MR. BAHRET: Objection.

11:46:59 3 A. I don't know when this picture was taken.

11:47:01 4 MR. BAHRET: I object.

11:47:02 5 THE COURT: The witness has answered, so  
11:47:04 6 I'll overrule the objection.

11:47:10 7 MR. BAHRET: There's been no testimony, Your  
11:47:12 8 Honor, about three feet.

11:47:12 9 THE COURT: I understand. That's what gave  
11:47:14 10 me pause. Counsel should be careful not to testify or  
11:47:20 11 attempt to testify.

11:47:21 12 MR. ROBON: I'm sorry, Your Honor.

11:47:23 13 BY MR. ROBON:

11:47:23 14 Q. Mr. Pauley, if you found that monument when you  
11:47:28 15 were posting the ribbon, what would you have done?

11:47:33 16 A. Located it.

11:47:37 17 Q. Would you have used that as a guide for the  
11:47:39 18 property line, yes or no?

11:47:46 19 A. Yes.

11:47:48 20 Q. But neither you nor Mr. Babcock could find those  
11:47:53 21 monuments, correct?

11:47:54 22 A. We weren't instructed to look for them.

11:47:57 23 Q. Okay. Are you aware -- do you know what a  
11:48:01 24 subdivision plat is?

11:48:02 25 A. Sure.



11:48:02 1 Q. Do you know that subdivision plats are filed with  
11:48:06 2 the county recorder's office?

11:48:07 3 A. Yes.

11:48:08 4 Q. And you know it shows where the corner stakes are  
11:48:10 5 in a subdivision plat?

11:48:11 6 A. Yes.

11:48:14 7 Q. Was this the only subdivision that abutted the  
11:48:16 8 nine miles that you were marking?

11:48:19 9 A. I don't believe so.

11:48:21 10 Q. Which other one abutted it?

11:48:23 11 A. I don't have specific names. All of them.

11:48:29 12 Q. Would you -- do you recall seeing the house on  
11:48:34 13 the Cambridge Subdivision?

11:48:36 14 A. After clearing, yes.

11:48:38 15 Q. After the clearing. You could not see the house  
11:48:41 16 when you were putting ribbons on the right-of-way line?

11:48:45 17 A. I wasn't -- I wasn't there to locate the house.  
11:48:48 18 It wasn't -- I didn't go out there and say, Oh, there's  
11:48:51 19 the house or there's not the house. That wasn't my  
11:48:54 20 scope of work.

11:48:54 21 Q. So you didn't recognize the fact that there was a  
11:48:57 22 house in this subdivision until after the clearing took  
11:49:01 23 place, which was after you went out and put ribbons on  
11:49:04 24 the property line?

11:49:05 25 A. That's correct.

11:49:28 1 Q. I'm handing you Exhibit Number 7. Have you ever  
11:49:31 2 seen the Peterman survey?

11:49:37 3 A. It looks very similar to a survey that I did of  
11:49:41 4 the area myself. Yes, I believe I've seen this picture  
11:49:45 5 before.

11:49:48 6 Q. Did you see any encroachment that Peterman shows  
11:49:52 7 on the survey?

11:49:53 8 A. I didn't physically calculate what that  
11:49:56 9 encroachment was or wasn't. But I've heard that there  
11:50:00 10 was a determination there was an encroachment.

11:50:03 11 Q. Did you go out with a City surveyor to check  
11:50:09 12 Peterman's work?

11:50:12 13 A. I don't think to specifically check his work, no.

11:50:16 14 MR. ROBON: No further questions, Your  
11:50:20 15 Honor.

11:50:20 16 THE COURT: Redirect?

11:50:21 17 MR. BAHRET: Briefly.

11:50:22 18 - - -

11:50:22 19 TIMOTHY PAULEY, REDIRECT EXAMINATION

11:50:23 20 BY MR. BAHRET:

11:50:23 21 Q. But you did go back out to see if there's an  
11:50:26 22 encroachment, correct?

11:50:29 23 A. Yes.

11:50:29 24 Q. Not necessarily to verify Peterman's work but to  
11:50:32 25 verify whether there's an encroachment?

11:50:34 1 A. That's correct.

11:50:35 2 Q. You talked about the word "offset." I want to  
11:50:38 3 make sure we define that for the jury. As I understand  
11:50:40 4 it, you position your GPS, and it tells you go 23 feet  
11:50:48 5 left. You then tape measure or something out there,  
11:50:50 6 and you call that an offset?

11:50:52 7 A. Yes.

11:50:55 8 Q. Your purpose out there is to identify as close as  
11:51:00 9 you can, to the millimeter if you could, a property  
11:51:04 10 line; is that right?

11:51:05 11 A. Yes.

11:51:05 12 Q. I mean, you don't just willy-nilly say three feet  
11:51:09 13 away is the property line, you mark the line?

11:51:11 14 A. No.

11:51:12 15 Q. Now, Mr. Robon asked you about the fence. If  
11:51:19 16 you locate your GPS device and it -- I'm just giving you  
11:51:24 17 a theoretical -- and it says you're exactly 20 feet off,  
11:51:29 18 so you tape measure 20 feet over, but you see a railroad  
11:51:32 19 fence five more feet over, where are you going to mark,  
11:51:37 20 on the fence or at the --

11:51:39 21 A. At the 20-foot mark.

11:51:42 22 Q. Same example -- well, changed example, but the  
11:51:44 23 same theory. GPS tells me go over there 20 feet. I  
11:51:48 24 tape measure out 20 feet, and lo and behold, my tape  
11:51:53 25 measure is sticking through the fence. Where am I going

11:51:55 1 to mark?

11:51:55 2 A. I mark on the area of occupation, which would be  
11:51:59 3 my side of the fence, not the fence itself.

11:52:02 4 Q. So you'd mark less than what is called for?

11:52:06 5 A. Yeah. I would utilize occupation in that  
11:52:08 6 instance.

11:52:09 7 Q. And that's what you mean when you say you honor  
11:52:11 8 evidence of occupation?

11:52:12 9 A. That's correct.

11:52:14 10 Q. Is that what was done on this job?

11:52:16 11 A. Yes.

11:52:18 12 MR. BAHRET: Thank you.

11:52:21 13 MR. ROBON: Nothing further.

11:52:22 14 THE COURT: Thank you. You may step down.  
11:52:24 15 We're at a good place for our lunch recess today. It's  
11:52:33 16 10 of 12:00. Can we be back by 1:00? Great. We're  
11:52:39 17 in recess until 1:00 p.m. Please remember the rules.

12:27:20 18 (Lunch recess taken.)

12:27:20 19 - - -

13:05:40 20 NICHOLAS RONA U, DIRECT EXAMINATION

13:05:41 21 BY MR. BAHRET:

13:05:41 22 Q. Nick, could you state your full name for the  
13:05:48 23 jury?

13:05:48 24 A. Nicholas Francis Ronau.

13:05:51 25 MR. ROBON: What was the last name.

13:05:54 1 THE COURT: Ronau, R-o-n-a-u.

13:05:56 2 Q. How old are you?

13:05:57 3 A. Fifty-eight.

13:05:59 4 Q. Tell me about your educational background.

13:06:03 5 A. Basically after high school I had a couple years  
13:06:08 6 in the service; I took some adult education courses at  
13:06:13 7 Com. Tech University of Toledo that led me into  
13:06:17 8 surveying.

13:06:17 9 Q. Okay. How long have you been in surveying?

13:06:21 10 A. About 40 years.

13:06:24 11 Q. Are you licensed in the state?

13:06:26 12 A. I've been licensed since 1980.

13:06:30 13 Q. What other qualifications do you hold to do  
13:06:33 14 survey work, if any?

13:06:37 15 A. My licensure and my experience.

13:06:41 16 Q. Briefly, don't spend a lot of time, but tell us  
13:06:44 17 your employment history. I know now you're with Toledo,  
13:06:47 18 but tell us your background?

13:06:49 19 A. Most of my experience has been doing boundary  
13:06:52 20 work, property surveys with survey companies or  
13:06:55 21 consulting engineers. Pretty good balance of both  
13:07:00 22 construction and boundary work.

13:07:02 23 Q. All right. And have you always been in this  
13:07:04 24 general area?

13:07:07 25 A. Except for a brief couple years -- or actually,

13:07:10 1 only one year in Oklahoma.

13:07:13 2 Q. In the what?

13:07:14 3 A. Oklahoma.

13:07:16 4 Q. How long have you been with the City of Toledo?

13:07:18 5 A. It will be five years in August.

13:07:23 6 Q. Did you have any involvement in the staking or  
13:07:27 7 the demarcation of the boundaries for the water main  
13:07:31 8 project that brings us here today?

13:07:33 9 A. Yes.

13:07:34 10 Q. And can you tell us what your role was?

13:07:36 11 A. Basically field supervision as far as  
13:07:44 12 coordinating between what the project engineer, the  
13:07:48 13 consultant, and my supervisor wanted done, applying it  
13:07:53 14 to what we're trying to accomplish in the field.

13:07:56 15 Q. Who is your direct supervisor?

13:07:58 16 A. Robert Babcock.

13:07:59 17 Q. Do you have anybody working under you or under  
13:08:02 18 your direction?

13:08:03 19 A. Whoever I happen to be out with typically is  
13:08:05 20 under my supervision.

13:08:06 21 Q. All right. On this particular job in the area  
13:08:10 22 near what you now know as Cambridge, who did you have  
13:08:14 23 working under you then?

13:08:15 24 A. Tim Pauley would have been the most likely.

13:08:18 25 There would have been a few other people in and out, but

13:08:22 1 he was the most consistent.

13:08:24 2 Q. Can you describe how do you work with, in this  
13:08:26 3 case, Mr. Pauley? What's your role? What's his role?  
13:08:30 4 How do you get the job done?

13:08:32 5 A. Tim typically does most of the technical or  
13:08:37 6 mechanical work as far as the instrumentation or as I  
13:08:40 7 relate what is actually on the plan and apply it to what  
13:08:45 8 we're trying to accomplish in the field.

13:08:48 9 Q. So you have the Arcadis plans with you?

13:08:51 10 A. Correct.

13:08:52 11 Q. Then you and Tim are in conversation? You give  
13:08:57 12 data; he sits on a spot?

13:08:59 13 A. That's correct.

13:09:00 14 Q. Then I understood that he called it an offset; he  
13:09:04 15 measures from that spot over?

13:09:06 16 A. That's one of several methods, yes.

13:09:08 17 Q. Is that an accepted method?

13:09:10 18 A. Definitely.

13:09:11 19 Q. And is that a method that was used by Mr. Pauley  
13:09:14 20 and yourself?

13:09:16 21 A. Very often, yes. If the point I'm trying to  
13:09:22 22 establish is easily accessible, we'll walk up to it and  
13:09:27 23 set the point itself. If it's going through brush or  
13:09:31 24 trees or whatever, if it's not that accessible, then we  
13:09:34 25 create a point, determine what the offset is and make a

13:09:37 1 measurement.

13:09:37 2 Q. So was it a large part of Mr. Pauley's work  
13:09:41 3 looking at -- I gather it's somewhat like on a stake and  
13:09:45 4 some machine that's sizeable?

13:09:47 5 A. It's a data collector. A field computer  
13:09:50 6 actually.

13:09:51 7 Q. You look down in it and read data?

13:09:54 8 A. You're just reading a small screen, a very small  
13:09:56 9 screen.

13:09:57 10 Q. Is it on the top of the machine?

13:09:58 11 A. Yes.

13:09:59 12 Q. And then how is the line marked?

13:10:04 13 A. In the field?

13:10:05 14 Q. Yeah. What's the methodology for marking the  
13:10:09 15 border so that others that follow know where it is?

13:10:12 16 A. If it's an open area, typically we'd drive a lath  
13:10:17 17 and put pink or orange flagging on it. If it were a  
13:10:20 18 wooded or brushy area, we'll measure and tie flagging on  
13:10:24 19 a fence or tree limb or a tree itself or a power pole or  
13:10:28 20 whatever happens to be there.

13:10:32 21 Q. And is whatever you tie it on, like a tree limb,  
13:10:37 22 is that the border in a vertical sense?

13:10:39 23 A. Yes.

13:10:43 24 Q. And then after -- let me back up. Do you  
13:10:49 25 remember working behind what you now know as Cambridge?



13:10:54 1 A. Not specifically.

13:10:58 2 Q. Roughly how long was this project, that section  
13:11:01 3 of the project that you were working on that year, if  
13:11:04 4 you know?

13:11:06 5 A. It had to be two or three miles.

13:11:09 6 Q. And at least at this point Cambridge specifically  
13:11:13 7 didn't stick out specifically in your mind?

13:11:15 8 A. No.

13:11:16 9 Q. Did there ever come a time when it did stick out  
13:11:19 10 in your mind?

13:11:19 11 A. Yes. Yes.

13:11:21 12 Q. When was that?

13:11:22 13 A. Once it became an issue as to what was cleared  
13:11:25 14 and what wasn't cleared, then we had made a few other  
13:11:29 15 trips out there to verify.

13:11:30 16 Q. Tell us about that. To speed it up, you became  
13:11:33 17 aware of an allegation that there was an encroachment?

13:11:38 18 A. Yes.

13:11:39 19 Q. What did you do when provided that information?

13:11:43 20 A. We had gone back out and located what tree stumps  
13:11:48 21 were visible in that particular area and just did a  
13:11:55 22 general -- we call it topographical survey, shot  
13:11:59 23 elevations on the ground features, tied in what  
13:12:03 24 monumentation we were able to locate. Just verifying  
13:12:07 25 where we were in relation to what was shown on the

13:12:10 1 plans.

13:12:10 2 Q. And who assisted you, if anybody, on that effort?

13:12:13 3 A. Most of that would have been Tim Pauley.

13:12:16 4 Q. What did you determine based upon that work that  
13:12:19 5 you did after the clearing was done?

13:12:22 6 A. Our feelings was that we were inside our limits.

13:12:26 7 MR. ROBON: Objection to feelings, Your  
13:12:32 8 Honor.

13:12:32 9 A. It was our belief at that point in time that we  
13:12:35 10 were within our limits.

13:12:36 11 THE COURT: Thank you. Overruled.

13:12:39 12 Q. Is that belief held to a reasonable degree of  
13:12:42 13 certainty within the field of surveying?

13:12:44 14 A. Yes.

13:12:48 15 Q. Did you ever come to a contrary conclusion?

13:12:50 16 A. No.

13:12:57 17 Q. Were you there when the clearing work itself was  
13:12:59 18 done?

13:12:59 19 A. No.

13:13:00 20 Q. So you went back and you looked at trees that  
13:13:03 21 were cut down -- or the evidence, I should say?

13:13:05 22 A. Correct.

13:13:11 23 Q. Do you know was that work done before or after  
13:13:14 24 somebody brought in a bunch of dirt on the back of Old  
13:13:17 25 Granite?

13:13:17 1 A. The clearing was done previous.

13:13:19 2 Q. I lost you there. I'm sure it's my fault.

13:13:23 3 Your work, when you went back because of the boundary  
13:13:26 4 dispute, was that done before or after somebody dumped  
13:13:30 5 all the dirt on the back of Cambridge?

13:13:32 6 A. Actually we were there before and after.

13:13:34 7 Q. All right. So you saw the undisturbed evidence,  
13:13:39 8 then you later saw whatever was there, the dirt?

13:13:43 9 A. Yes.

13:13:47 10 Q. And were you able to reach that conclusion you  
13:13:49 11 told us about when you looked at the undisturbed  
13:13:52 12 evidence?

13:13:52 13 A. Yes.

13:13:53 14 Q. In other words, your opinion was there was no  
13:13:55 15 encroachment?

13:13:56 16 A. Correct.

13:13:57 17 Q. Now, did you thereafter ever get involved in the  
13:14:02 18 issue of a manhole cover or a manhole, I should say, in  
13:14:07 19 the vicinity of but not on Cambridge property?

13:14:11 20 A. Yes.

13:14:11 21 Q. Tell us about that. What was the issue that you  
13:14:14 22 were involved in there?

13:14:17 23 A. It was when they installed the waterline, I  
13:14:21 24 believe there was a conflict with an existing pipe. At  
13:14:27 25 that point we were trying to determine whether or not --

13:14:30 1 or determine if there was going to be a conflict, so we  
13:14:33 2 had to take some measurements on that structure.

13:14:36 3 Q. Okay. And to do that measurement, and again  
13:14:40 4 speed this up, Mr. Pauley said that he actually used --  
13:14:44 5 I forget if he called it a rod or what. He used some  
13:14:48 6 device down in the manhole and took measurements from  
13:14:50 7 the top of the pipe, the bottom of the pipe. Would you  
13:14:53 8 agree that basically is what was done?

13:14:55 9 A. Basically the measurement was made from the top  
13:14:58 10 of the manhole to the bottom of the pipe.

13:15:00 11 Q. Okay. And what was your role in that? What did  
13:15:03 12 he do and what did you do?

13:15:05 13 A. Typically he would take the measurements. I  
13:15:07 14 would draw the sketch and record what his measurements  
13:15:10 15 are.

13:15:11 16 Q. And is -- if you'll look at your screen. Is this  
13:15:25 17 exhibit that it's in front of you, Defendant's Exhibit  
13:15:28 18 K, the sketch you're talking about?

13:15:29 19 A. Yes.

13:15:30 20 Q. Did you have any role in the creation of this  
13:15:33 21 sketch?

13:15:33 22 A. Yes, that's my sketch, and it's my numbers, my  
13:15:38 23 notes.

13:15:40 24 Q. Is the date on that thing 10/24/06? Is that the  
13:15:45 25 date you made the sketch or the date you did the

13:15:47 1 investigation, or what?

13:15:48 2 A. I would say it all happened simultaneously.

13:15:55 3 Q. That refers to a 24-inch pipe on there, right  
13:16:05 4 there?

13:16:05 5 A. Yes.

13:16:06 6 Q. Would that be -- the 24-inch pipe, is that the  
13:16:11 7 crossover pipe under the railroad, the abandoned  
13:16:15 8 railroad right-of-way?

13:16:16 9 A. Yes.

13:16:17 10 Q. Now, Mr. Pauley said that he believes or he  
13:16:22 11 believed at that time that he found the outlet. Did  
13:16:26 12 you find an outlet for that pipe in the ditch between  
13:16:29 13 the two railroads?

13:16:30 14 A. No, we did not.

13:16:31 15 Q. Were there any other areas that you had  
13:16:34 16 investigated in this project where outlet pipes were  
13:16:37 17 found?

13:16:38 18 A. Yes.

13:16:40 19 Q. And Mr. Pauley identified a concrete outlet pipe.  
13:16:50 20 Do you know if the pipe that was measured here was  
13:16:53 21 concrete, or was it vitrified clay?

13:17:02 22 A. I'm not certain.

13:17:04 23 Q. But are you certain there was no outlet pipe,  
13:17:06 24 whether concrete or other material, found, that manhole?

13:17:09 25 A. There was none found. There was none visible.

13:17:12 1 Q. Do you recall looking?

13:17:14 2 A. Yes.

13:17:23 3 Q. When the clearing was done behind Cambridge, when  
13:17:26 4 you were next there, could you still see markings in the  
13:17:30 5 trees or on the weeds or whatever you had marked?

13:17:32 6 A. Yes, there was still ribbon.

13:17:34 7 Q. And the line was still visible?

13:17:36 8 A. Yes.

13:17:38 9 MR. BAHRET: Thank you, sir.

13:17:42 10 - - -

13:17:42 11 NICHOLAS RONAU, CROSS-EXAMINATION

13:17:43 12 BY MR. ROBON:

13:17:43 13 Q. Mr. Ronau, you would agree with me that if the  
13:18:02 14 clearing that the City did was inside or beyond the  
13:18:08 15 monument, surveying monument, that the contractor and  
13:18:14 16 the City would have encroached into private property?

13:18:20 17 A. Yes.

13:18:24 18 Q. I'm going to hand you Exhibit Number 54. You  
13:18:49 19 see this concrete monument?

13:18:51 20 A. Yes.

13:18:54 21 Q. When was the first time you ever saw that  
13:18:56 22 concrete monument?

13:18:58 23 A. I don't know if I've ever seen it before. I  
13:19:01 24 have no idea where that monument is or what it  
13:19:04 25 represents.

13:19:04 1 Q. You're telling this jury that you went out and  
13:19:07 2 surveyed the rear of the Cambridge Subdivision and never  
13:19:12 3 saw -- there's two monuments there. You never saw  
13:19:16 4 either one of them?

13:19:17 5 A. I've seen both monuments of Cambridge, but how do  
13:19:22 6 I know that's this monument.

13:19:24 7 Q. Well, there's been testimony about that.

13:19:27 8 A. Not in my presence.

13:19:30 9 Q. So do you acknowledge that you saw monuments of  
13:19:33 10 the Cambridge Subdivision?

13:19:34 11 A. Yes, I do.

13:19:35 12 Q. When was the first time you saw it? I mean, you  
13:19:40 13 went out --

13:19:41 14 A. At some point after the clearing.

13:19:43 15 Q. And did you string a line or run a transit  
13:19:47 16 between the two monuments and see clearing towards the  
13:19:52 17 Cambridge Subdivision?

13:19:53 18 A. No, I did not.

13:19:54 19 Q. You didn't do that? Do you acknowledge that  
13:19:58 20 there was clearing towards the subdivision beyond the  
13:20:02 21 monument? Could you see that? The tree stumps that  
13:20:08 22 you saw --

13:20:08 23 A. No, I have no knowledge of that.

13:20:09 24 Q. Did you do a survey print for this jury?

13:20:12 25 A. I collected information in the field. I didn't

13:20:17 1 create any documentation.

13:20:19 2 Q. Did Mr. Babcock at the City of Toledo create a  
13:20:24 3 survey?

13:20:25 4 A. Yes.

13:20:25 5 Q. And where is that?

13:20:28 6 A. I believe he has it in his possession.

13:20:36 7 MR. BAHRET: For the record it's an  
13:20:38 8 identified exhibit, and we've given them copies.

13:20:43 9 BY MR. ROBON:

13:20:43 10 Q. Mr. Ronau, when you did this two or three miles  
13:20:47 11 of staking, how many subdivisions did the railroad  
13:20:52 12 right-of-way abut, residential subdivisions? Any other  
13:20:58 13 than Cambridge?

13:20:58 14 A. There were other subdivisions, yes.

13:21:01 15 Q. Did you see the house that was constructed on the  
13:21:06 16 Cambridge Subdivision when you first went out and put  
13:21:09 17 ribbons on the trees?

13:21:10 18 A. Yes.

13:21:11 19 Q. Did you think about the fact that maybe the  
13:21:16 20 contractor ought to stay a few feet away from the  
13:21:19 21 subdivision?

13:21:20 22 A. No.

13:21:22 23 Q. Did you use the railroad fence as a guide --

13:21:25 24 A. Yes.

13:21:26 25 Q. -- for the property line?



13:21:29 1 A. We honored all the occupation, yes.

13:21:32 2 Q. So if the railroad fence was pushed over four or  
13:21:38 3 five feet onto the Cambridge Subdivision, you still  
13:21:41 4 would have used the railroad as a guide?

13:21:43 5 A. We would have tried to determine where the bottom  
13:21:45 6 of the fence would have been, yes.

13:21:47 7 Q. Well, was there a fence all along the back of the  
13:21:55 8 Cambridge Subdivision, or you don't remember?

13:21:57 9 A. I really don't recall.

13:22:00 10 Q. Do you remember any railroad ties?

13:22:02 11 A. Yes.

13:22:03 12 Q. Were they pushed over?

13:22:05 13 A. They were leaning.

13:22:07 14 Q. They were leaning in towards the Cambridge  
13:22:09 15 Subdivision?

13:22:09 16 A. Correct.

13:22:09 17 Q. Several feet?

13:22:13 18 A. I would say a foot plus or minus.

13:22:16 19 Q. And were they kind of rotten at the top?

13:22:19 20 A. Yeah, they were in pretty bad shape.

13:22:40 21 Q. I'm going to hand you Exhibit 7. This is a  
13:22:42 22 survey that Peterman & Associates prepared. And it  
13:22:47 23 shows an encroachment up to six feet into the Cambridge  
13:22:54 24 Subdivision, lots 12, 13, 14, and 15. Have you seen  
13:22:58 25 that document in the past?

13:23:00 1 A. No, I haven't.

13:23:02 2 Q. The City lawyers never gave you that survey?

13:23:06 3 A. The City may have seen it. I have not seen it  
13:23:10 4 personally, no.

13:23:16 5 Q. Do you know Nick Nigh of Peterman Surveying  
13:23:20 6 Company -- Engineering?

13:23:21 7 A. No, I do not.

13:23:22 8 Q. Do you know of the name Peterman?

13:23:24 9 A. Yes.

13:23:25 10 Q. Are they recognized to be fine engineers and  
13:23:28 11 surveyors?

13:23:28 12 A. To the best of my knowledge, yes.

13:23:33 13 Q. Had anybody ever discussed with you the survey  
13:23:36 14 that's in your hands prepared by Peterman?

13:23:39 15 A. It was mentioned, yes.

13:23:41 16 Q. You never asked to see it?

13:23:43 17 A. No.

13:23:46 18 Q. Do you think Mr. Nigh is in error when he sealed  
13:23:51 19 there at the bottom?

13:23:54 20 A. I would say no.

13:23:56 21 Q. Do you think his survey is accurate?

13:24:00 22 A. I have no reason not to think so.

13:24:05 23 MR. ROBON: No further questions.

13:24:06 24 THE COURT: Any redirect?

13:24:07 25 MR. BAHRET: Yes.

13:24:11 1

- - -

13:24:11 2

NICHOLAS RONA, REDIRECT EXAMINATION

13:24:14 3

BY MR. BAHRET:

13:24:14 4

Q. When you say the survey is accurate, are you

13:24:16 5

talking about the property line or the evidence that he

13:24:18 6

claims he saw of tree stumps and so forth?

13:24:21 7

A. I don't know that either one would be inaccurate.

13:24:27 8

Q. Sir, when we talked about giving credibility to

13:24:32 9

the -- I forget what you called it, not monument,

13:24:38 10

credibility to the historical occupancy or something

13:24:41 11

like that?

13:24:41 12

A. Yes.

13:24:42 13

Q. If you locate your GPS device, and it says the

13:24:49 14

border is 20 feet to my left, you take the tape or

13:24:54 15

whatever, you walk 20 feet, make sure you're at 20 feet

13:24:58 16

and not 21, what if the fence is five more feet away?

13:25:02 17

Where do you mark?

13:25:03 18

A. We mark the 20 feet. We never go beyond our

13:25:06 19

limits.

13:25:07 20

Q. So if the fence is less than 20 feet, say it's 18

13:25:11 21

feet --

13:25:11 22

A. Then we mark the fence.

13:25:14 23

Q. So it's the lesser of either the historical

13:25:17 24

monument or what our data shows is the property line?

13:25:21 25

A. Correct.

13:25:23 1 MR. BAHRET: Thank you.

13:25:27 2 THE WITNESS: I might mention also by  
13:25:28 3 measuring the offset, you'll never end up with a low  
13:25:31 4 measurement. You will always end up short because you  
13:25:34 5 may not be perpendicular, or there may be obstructions.  
13:25:38 6 So it's never going to be a greater than 20-foot  
13:25:41 7 measurement. It would be less than.

13:25:44 8 Q. By that you mean if you take out your tape 20  
13:25:47 9 feet and you walk offline, you're not going to be 20  
13:25:53 10 feet; you can only be -- or the farthest distance will  
13:25:56 11 be at a 90 degree angle?

13:25:58 12 A. That is correct.

13:26:01 13 MR. BAHRET: Okay. Thank you.

13:26:02 14 THE COURT: Further --

13:26:03 15 - - -

13:26:04 16 NICHOLAS RONA, RE-CROSS-EXAMINATION

13:26:06 17 BY MR. ROBON:

13:26:06 18 Q. You still don't dispute the accuracy of Mr.  
13:26:12 19 Nigh's showing an encroachment, do you?

13:26:15 20 A. No.

13:26:16 21 THE COURT: You may step down. Thank you.  
13:26:18 22 Your next witness?

13:26:33 23 MR. BAHRET: The next witness, Your Honor,  
13:26:35 24 is going to be Mr. Babcock.

13:26:40 25 MR. ROBON: Your Honor, one of the jurors --

13:26:45 1 THE JUROR: Could I have that turned just a  
13:26:47 2 little bit. The light is absolutely blinding me.

13:27:12 3 (The witness was sworn by the clerk.)

13:27:23 4 - - -

13:27:23 5 ROBERT BABCOCK, DIRECT EXAMINATION

13:27:24 6 BY MR. BAHRET:

13:27:24 7 Q. Good afternoon. Can you state your full name  
13:27:33 8 for the jury.

13:27:33 9 A. My name is Robert Allen Babcock, B-a-b-c-o-c-k.

13:27:38 10 Q. How old are you, sir?

13:27:39 11 A. Thirty-five.

13:27:40 12 Q. And tell me about -- well, you're a surveyor,  
13:27:45 13 chief surveyor for the City of Toledo?

13:27:47 14 A. Correct.

13:27:48 15 Q. How did you become qualified to be the chief  
13:27:50 16 surveyor for the City of Toledo?

13:27:52 17 A. Well, I was hired in by the City, and I met the  
13:27:56 18 qualifications, and I applied for the position, and I  
13:27:58 19 met all their qualifications.

13:28:00 20 Q. Okay. That was -- we didn't communicate. That  
13:28:03 21 was a fancy way of asking you how did you become -- what  
13:28:09 22 is your licensure? Where did you go to school, your  
13:28:12 23 experience?

13:28:12 24 A. I've been in surveying since the Corps, 1983.

13:28:17 25 Q. When you say the Corps?

13:28:19 1 A. Corps of Engineers.

13:28:20 2 Q. Okay.

13:28:21 3 A. And then I took my test in '85, passed my  
13:28:25 4 professional. I'm sorry, '95, because you had to have  
13:28:30 5 ten years requirement in the field. I basically am a  
13:28:33 6 field surveyor from the old ten-year law, the ten years  
13:28:39 7 you had to qualify.

13:28:40 8 Q. Okay.

13:28:41 9 A. And that's how you met the minimum standards for  
13:28:44 10 state law.

13:28:45 11 Q. Is it something different now?

13:28:46 12 A. Yeah, four years. They don't have as much field  
13:28:51 13 work.

13:28:51 14 Q. Okay. Are you licensed?

13:28:53 15 A. Yes.

13:28:54 16 Q. And how long have you been licensed?

13:28:56 17 A. Thirteen years.

13:28:57 18 Q. And you may have told me this. Forgive me. How  
13:29:00 19 long have you worked for the City?

13:29:01 20 A. Eleven.

13:29:04 21 Q. And in what -- what capacity do you have or what  
13:29:08 22 was your involvement, if any, in the project for the  
13:29:11 23 water main that we now know goes behind Cambridge?

13:29:16 24 A. I basically took the information that our  
13:29:18 25 consultant did.

13:29:19 1 Q. That's Arcadis?

13:29:21 2 A. Yes, sir. FPS at that time. I basically  
13:29:27 3 checked it and reviewed it and took their data they  
13:29:30 4 provided to us in an auto CAD format and inserted it  
13:29:35 5 into our data collectors, then state their design per  
13:29:39 6 coordinates.

13:29:40 7 Q. The jury's going to be shock when I ask you this  
13:29:43 8 because they know I'm a real techno wizard. In English  
13:29:47 9 what's it mean to go from the auto CAD and put it into  
13:29:50 10 your data?

13:29:51 11 A. It's a digital format that I'm sure most people  
13:29:54 12 have heard of auto CAD. It's a design program on the  
13:29:57 13 computer which is a drafting tool. Basically the CAD  
13:30:02 14 draftsman of the day when they used to use pencils and  
13:30:05 15 triangles and slide bars to draft, they're doing it on  
13:30:09 16 computers now. And they design these using cartesian  
13:30:13 17 coordinates. It's a coordinate system that everybody's  
13:30:16 18 used in trigonometry. We basically would take these  
13:30:22 19 coordinate systems, and you're working in a data spacial  
13:30:27 20 base. It's almost like the real world, but it's in the  
13:30:30 21 computer. Does that make sense?

13:30:32 22 Q. Yes.

13:30:34 23 A. It's taking a real world measurement and drawing  
13:30:42 24 it on a computer to be equal to one unit.

13:30:46 25 Q. Basically you're checking these plans and then

13:30:49 1 loading the data into some sort of device you need in  
13:30:52 2 the field then?

13:30:53 3 A. Yes, sir.

13:30:54 4 Q. And what was your role thereafter, if any?

13:30:56 5 A. Basically I made sure that everything checked and  
13:31:00 6 was correct per the design of the plans. And after  
13:31:04 7 loading it I gave it to my field crew, and they went out  
13:31:07 8 and would localize the GPS unit onto these fixed  
13:31:13 9 coordinate points that were relative to the design.

13:31:15 10 Q. Nick, the guy that just got done testifying here,  
13:31:18 11 was he the supervisor of one of these crews?

13:31:21 12 A. Yes, sir.

13:31:21 13 Q. And Mr. Pauley works under his supervision?

13:31:24 14 A. Yes, sir.

13:31:25 15 Q. What's the chain: You, Mr. Ronau, then Mr.  
13:31:29 16 Pauley?

13:31:30 17 A. Yes.

13:31:32 18 Q. Then when did you next have any involvement in  
13:31:35 19 any issue involving the marking of the property line for  
13:31:39 20 the water main project?

13:31:42 21 A. Involvement as to?

13:31:43 22 Q. Were you?

13:31:44 23 A. I was always involved.

13:31:46 24 Q. Were you day-to-day out there?

13:31:47 25 A. No, sir. I would listen to the day-to-day



13:31:50 1 reports and check the data collectors on a day-to-day  
13:31:54 2 basis after the work was completed and they had gone out  
13:31:58 3 in the field, verifying what was staked.

13:32:00 4 Q. Have you been out in the field before any of the  
13:32:02 5 land clearing was done?

13:32:03 6 A. Yes, sir.

13:32:03 7 Q. Do you have any recollection of being in the area  
13:32:06 8 near Cambridge, what we now know is Cambridge?

13:32:09 9 A. Yes, sir.

13:32:10 10 Q. What do you recall seeing there?

13:32:11 11 A. Brambles and briar. Sumac, basically.

13:32:17 12 Q. Could you see any housing on that development?

13:32:20 13 A. Yes, you could see through the foliage, you could  
13:32:23 14 see houses. And actually you can see some of the  
13:32:26 15 barren farmland.

13:32:27 16 Q. Did you have any problem seeing the houses?

13:32:31 17 A. By problems, just other than the sumac that's  
13:32:35 18 kind of like -- you were seeing through; it was like  
13:32:38 19 looking through a corn field.

13:32:41 20 Q. But did you have to take any special effort to  
13:32:45 21 see a house?

13:32:46 22 A. No, sir.

13:32:46 23 Q. Or it's readily there?

13:32:48 24 A. Yeah.

13:32:48 25 Q. Okay. Were you there as any of the staking near

13:32:54 1 Cambridge was -- I call it staking; I know they tied  
13:32:57 2 ribbons and so forth -- when any of that work was being  
13:33:01 3 done in the Cambridge area?

13:33:02 4 A. No. Delineation of the clearing?

13:33:03 5 Q. Yes.

13:33:04 6 A. I was not there personally for that area until it  
13:33:07 7 became a problem area.

13:33:09 8 Q. All right. By the way, for delineating  
13:33:12 9 something, what is the job of the surveyor? What are  
13:33:16 10 you trying to delineate?

13:33:18 11 A. To mark out -- in the case of the railroad, to  
13:33:21 12 mark out the delineation means that we would be marking  
13:33:25 13 where the limits of the construction site or the  
13:33:28 14 easements were agreed upon by the railroad and the City  
13:33:32 15 of Toledo.

13:33:32 16 Q. All right. So it's not an order that you have  
13:33:35 17 to clear; it's you're marking a border?

13:33:38 18 A. You're marking where your calculated center line  
13:33:44 19 for the design is. They have the limits laid out on the  
13:33:47 20 plans. We have those right-of-ways drawn on there. We  
13:33:51 21 went out and took that spacial database from the data  
13:33:54 22 collector and would plot that into the real world.  
13:33:56 23 Whenever we would reach a point where we met the line by  
13:34:01 24 design, we would stake that. But if we ran into  
13:34:04 25 somebody else's interest of occupation, we honored their

13:34:08 1 existing occupation.

13:34:12 2 Q. In fact, on this job did you run into any such  
13:34:15 3 circumstances?

13:34:16 4 A. Several.

13:34:20 5 Q. What would you do in these instances?

13:34:22 6 A. Depending on the validity and the severity of the  
13:34:25 7 encroachment, if it was minimal, within a foot, we would  
13:34:29 8 just honor their occupation. If it was as severe as 30  
13:34:33 9 feet, we would notify the design engineer.

13:34:36 10 Q. And nobody's alleging there was anything like  
13:34:38 11 that at Cambridge, but did you have some pretty  
13:34:42 12 significant discrepancies other places on this job?

13:34:45 13 A. Yes, sir.

13:34:45 14 Q. And resolved those?

13:34:46 15 A. Yes.

13:34:47 16 Q. And in fact --

13:34:49 17 A. To the satisfaction of both parties.

13:34:52 18 Q. Wasn't there a garage or something on one place  
13:34:55 19 that was in the land --

13:34:56 20 A. That was in the first phase. That was just  
13:34:59 21 missed on the original topo from the consultant.

13:35:02 22 Q. In the area behind Cambridge, you mentioned at  
13:35:05 23 some point you became aware there was, in fact, a  
13:35:07 24 dispute?

13:35:08 25 A. Yes.

13:35:09 1 Q. How did that come to your attention?

13:35:11 2 A. Basically we marked out the clearing, and once  
13:35:16 3 the trees were cleared, I believe Joe Crandall was the  
13:35:21 4 first individual to tell me that there was a possibility  
13:35:25 5 that the homeowner is in disagreement where we cleared.

13:35:29 6 Q. And so what did you do in response to that?

13:35:32 7 A. I sent my survey crew out there.

13:35:35 8 Q. And would that again be Nick and Tim?

13:35:37 9 A. Yes, sir. Same crew.

13:35:40 10 Q. Did you ever go out and try to determine if there  
13:35:43 11 had been any encroachment?

13:35:45 12 A. When I actually went out there, most of the  
13:35:50 13 brambles, I guess you could call it, sumac that was left  
13:35:53 14 after the clearing had already had dirt dumped on them.

13:36:00 15 Q. What did you do to try to answer the problem --  
13:36:03 16 or the question as to whether there actually was any  
13:36:07 17 encroachment?

13:36:08 18 A. We didn't actually do a survey of the railroad's  
13:36:11 19 property center line, which is where we had an easement.  
13:36:15 20 We checked the interest of the homeowner and used their  
13:36:19 21 subdivision monumentation, and we worked it backwards  
13:36:22 22 towards the railroad. And we basically recalculated  
13:36:26 23 and found monumentation along the railroad right-of-way  
13:36:29 24 per his subdivision. I'm not saying it was right, but  
13:36:33 25 we honored his monument.

13:36:35 1 Q. Are the monuments that are marking the corners of  
13:36:38 2 Cambridge in any way in conflict with the right-of-way  
13:36:41 3 depicted from for the railroad?

13:36:43 4 A. Per the line that was supplied to us, yes. Per  
13:36:49 5 the actual center line of the railroad, I have no  
13:36:52 6 knowledge of that because we didn't do a survey of the  
13:36:54 7 railroad property line.

13:36:56 8 Q. Tell us what you then did, using the monuments  
13:37:01 9 that -- I think that's what you said you used, the  
13:37:05 10 monuments from the subdivision?

13:37:06 11 A. Yes, sir.

13:37:06 12 Q. Did you then plot that out?

13:37:08 13 A. Yes.

13:37:09 14 Q. And did you prepare any diagrams or paperwork  
13:37:14 15 concerning that?

13:37:14 16 A. I prepared at least three or four drawings.

13:37:18 17 Q. Okay. And I think some of these, you can come up  
13:37:24 18 if you want and help me go through which ones you need.  
13:37:27 19 What I want you to do is explain to the jury what your  
13:37:29 20 conclusions were and how you arrived at those  
13:37:33 21 conclusions, and use any of these documents that you  
13:37:36 22 need. And let me show you how we might be able to do  
13:37:39 23 this.

13:37:45 24 Have you ever used one of those projector type  
13:37:49 25 things?

13:37:49 1 A. Not since college.

13:37:51 2 Q. I'm not saying you have to use this document.

13:37:55 3 A. This is actually the best depiction of --

13:37:59 4 Q. All right. And let me get you a pencil or  
13:38:02 5 something to point with. If you would make sure you're  
13:38:10 6 in view because they've got screens, and there's one up  
13:38:13 7 here.

13:38:13 8 Explain what you did and what conclusions you  
13:38:16 9 came to.

13:38:16 10 And by the way, it's -- if you want to mark it on  
13:38:20 11 there for them you can just, I guess, touch that.

13:38:26 12 A. Well, basically what we did is we did a survey of  
13:38:29 13 the monumentation within the subdivision. We found  
13:38:32 14 existing monuments along the center line of the railroad  
13:38:35 15 and along the right-of-way. That led us to where we  
13:38:38 16 would find this monument right in this location right  
13:38:42 17 here. It would be in that area. We found that  
13:38:49 18 monument, and we found another monument down here, and  
13:38:53 19 we followed that line, and we staked that as if it was  
13:38:56 20 true. I can't guarantee you that that's true because,  
13:38:59 21 like I said, I don't know what rights may have been  
13:39:02 22 encroached or not encroached onto the railroad because  
13:39:04 23 we didn't survey the railroad's property. So by  
13:39:07 24 staking this line and shooting the fence that we had  
13:39:10 25 occupied out in the field after the clearing was done,

13:39:14 1 we actually were able to get in there prior to any of  
13:39:18 2 this dirt being brought and in this area. We shot the  
13:39:22 3 line of the fence. And then there was fill ribbon in  
13:39:26 4 some of these locations that were tied to some of the  
13:39:30 5 brambles from the clearing because they didn't cut all  
13:39:34 6 the way up to the bramble line that we marked. They  
13:39:37 7 came a little bit shy of that towards the railroad. So  
13:39:43 8 by doing that and taking that information from the  
13:39:45 9 subdivision line right through here, and where we shot  
13:39:48 10 the fence, we come up with basically four inches to this  
13:39:54 11 end. And then about 240 feet away we were at zero, and  
13:39:59 12 we stayed clear all the way through.

13:40:03 13 Q. Let me interrupt you.

13:40:06 14 MR. BAHRET: He's referring to Exhibit O.

13:40:12 15 A. So after we were able to get out there and shoot  
13:40:14 16 the existing clearing, we weren't able to get back out  
13:40:18 17 there because within a couple days, maybe a week, all  
13:40:21 18 the evidence that we needed to pick up for additional  
13:40:24 19 stumps -- because it became a question of some of the  
13:40:27 20 stumps were destroyed over on his property line. So I  
13:40:30 21 wanted to send a crew back up out there to pick these  
13:40:33 22 stumps up that were over in this area assumedly on his  
13:40:37 23 property. By the time we got back out there they had  
13:40:41 24 already been covered with three feet of dirt. So the  
13:40:43 25 only thing we have for evidence is what we're

13:40:46 1 hypothesizing on is where the line of the subdivision  
13:40:50 2 is. This is the last information we had from marking.  
13:40:53 3 So we really couldn't prove anything other than maybe  
13:40:57 4 there was maybe some dappled sumac brush there, four  
13:41:04 5 inches to zero by the time you got down to here.

13:41:08 6 Q. When you say four inches to zero, what are you  
13:41:11 7 telling me?

13:41:11 8 A. At the north end of the subdivision, right where  
13:41:15 9 the pen is, there would be about four inches clear to  
13:41:18 10 the railroad fence that we shot in occupation to the  
13:41:21 11 monument. And then about 250 feet back this way, it  
13:41:26 12 starts to get to where it's just zero. It's almost  
13:41:30 13 crossing. I don't know any other way to say this, but  
13:41:34 14 the railroad was on a different bearing than the  
13:41:37 15 subdivision. The railroad fence's line was a completely  
13:41:41 16 different bearing than the subdivision line. That's  
13:41:45 17 just because of the monumentation that was within the  
13:41:47 18 subdivision.

13:41:48 19 Q. Does that mean the railroad and the fence were  
13:41:53 20 not exactly parallel?

13:41:56 21 A. I can't say that because I didn't shoot the  
13:41:58 22 railroad like that. I shot the fence.

13:42:00 23 Q. I'm not -- trust me, I'm not trying to testify.  
13:42:03 24 I don't know what you mean by they're not on the same  
13:42:06 25 bearing.



13:42:06 1 A. A bearing is a line, like northeast, northwest.  
13:42:11 2 Those are bearings. And the line that -- the line that  
13:42:17 3 the railroad would be running on would be something like  
13:42:20 4 this. Then when you do the subdivision monumentation,  
13:42:25 5 they would cross. That's over exaggerating, but that's  
13:42:29 6 a totally different bearing that's how you would get  
13:42:33 7 this three inches, approximately four inches here, and  
13:42:36 8 you would get zero here, because they were not the same  
13:42:40 9 bearing.

13:42:41 10 Q. Okay. What does this mean here when you --  
13:42:45 11 plaintiff's hub online. What's that.

13:42:52 12 A. This is when I was notified Mr. McCarthy was not  
13:42:55 13 happy with the clearing that was done. And he went out  
13:42:59 14 and set hubs where he assumed his property -- the line  
13:43:03 15 was without a proper survey. And we went out and we  
13:43:06 16 shot the hubs. We shot his hub and we found it to be at  
13:43:15 17 this station per our plan. And this far -- 1.76 feet  
13:43:21 18 off of what the actual subdivision line was. Then if  
13:43:26 19 you ran that all the way through, that's the pink line  
13:43:30 20 that you see here, that's on a completely different  
13:43:33 21 bearing other than the railroad and the subdivision?

13:43:38 22 Q. So Mr. McCarthy put his stakes in the wrong place  
13:43:41 23 down here? I don't know which lot this would be, but at  
13:43:44 24 this end that we're pointing to on the plan here?

13:43:47 25 A. Yes. I believe he did it. I don't know if he

13:43:50 1 did it personally or had it hired. But they didn't  
13:43:53 2 look like any survey hubs of a company. They looked  
13:43:59 3 like something somebody had in the back of their truck  
13:44:02 4 for lawn work.

13:44:03 5 Q. Is there anything else on this document, Exhibit  
13:44:06 6 O, that is relevant to our discussion about a potential  
13:44:09 7 encroachment that you can use to explain to the jury, or  
13:44:16 8 are you pretty well done with that?

13:44:17 9 A. On this document you'll see there are some other  
13:44:20 10 distances in pink or magenta that says 1.29, 1.58. And  
13:44:27 11 basically these numbers are what we could have staked.  
13:44:31 12 This is -- it doesn't show up real well, but if you look  
13:44:37 13 right here there's a 1.29. That was the line that was  
13:44:41 14 supplied to us from our consultant, FPS. That's why we  
13:44:46 15 didn't honor it. If we would have staked out exactly  
13:44:49 16 the line we were given, we would have been one and a  
13:44:51 17 half feet over that fence. And we didn't want to go  
13:44:53 18 over that. Now, the homeowner at this residence right  
13:44:58 19 here had cleared up to this fence. So they  
13:45:00 20 acknowledged that they honored that fence. So in turn  
13:45:03 21 we left basically eight inches on the other side of that  
13:45:09 22 fence because it was -- it was deteriorated. It was  
13:45:12 23 laying over, and it was just crumbling. It was very  
13:45:17 24 old.

13:45:18 25 Q. So if I'm hearing you right, if you had literally

13:45:21 1 put your stakes or your markings in where FPS said was  
13:45:28 2 the actual border, they would have been on the wrong  
13:45:30 3 side of the fence?

13:45:31 4 A. Yes, sir. And it was already cleared on the  
13:45:34 5 other side of that fence. And that individual had  
13:45:36 6 honored the railroad fence. That's why I was telling  
13:45:39 7 my guys and I instructed them to honor existing  
13:45:42 8 occupation. If you see a homeowner has an interest up  
13:45:45 9 to that fence, then leave the fence. And that's what  
13:45:49 10 they did.

13:45:50 11 Q. Mr. Babcock, who prepared this document?

13:45:55 12 A. I did.

13:46:02 13 Q. You prepared these also over here; did you not?

13:46:05 14 A. Yes, sir.

13:46:09 15 Q. Is there anything on this document -- I guess  
13:46:12 16 this is Exhibit C -- that you could use to illustrate  
13:46:15 17 your point to the jury?

13:46:20 18 MR. ROBON: Could you hand me the other one.

13:46:43 19 A. It's kind of a small little square, but if you  
13:46:52 20 look at this --

13:46:54 21 Q. You're looking at Exhibit C?

13:46:57 22 A. If you look at this in the blue, the lines that  
13:47:01 23 you see here, those are contour lines to the half a foot  
13:47:07 24 that were supplied by a survey from Finkbeiner, Pettis,  
13:47:12 25 & Strout. This is what we did our profile design off

13:47:14 1 of for our pipe.

13:47:15 2 THE COURT: If you zoom that it might help.

13:47:28 3 A. So what you see here is what we had for existing  
13:47:31 4 topo from Finkbeiner, Pettis, and Strout. What you see  
13:47:37 5 here in the tan is the earth work that was done within a  
13:47:42 6 week after we had gotten out there to shoot this  
13:47:46 7 subdivision monument. We went out and occupied the  
13:47:55 8 center line monumentation for the subdivision. And  
13:47:57 9 that's how we were able to basically calculate where the  
13:48:02 10 occupation was between the railroad per the subdivision.  
13:48:06 11 And all this is showing is how much land was brought in  
13:48:11 12 and filled within the area over the existing drainage  
13:48:15 13 swale per the subdivision and onto his property and the  
13:48:20 14 adjoining property, which of the subdivision --

13:48:24 15 Q. Is this lot 15, the existing house?

13:48:28 16 A. Yes, sir, I believe that is. The house is  
13:48:34 17 somewhere right in here.

13:48:35 18 Q. Are these squiggles here, is that basically --

13:48:38 19 A. Topography.

13:48:41 20 Q. So that's up and down?

13:48:42 21 A. Yes. That's just a linear way of showing  
13:48:45 22 vertical change.

13:48:47 23 Q. Would this sort of thing change the way water  
13:48:50 24 flows?

13:48:50 25 A. Extremely. It would actually create a natural

13:48:54 1 barrier because this along here where the red line is,  
13:48:58 2 right through here is the red line for the delineation  
13:49:02 3 for the drainage easement that goes along here between  
13:49:05 4 the edges of the subdivision and back. And this was  
13:49:08 5 all filled almost -- I have to say at least six, seven  
13:49:12 6 feet.

13:49:16 7 Q. What else is relevant on that document? Help  
13:49:25 8 the jury understand. There's a plastic overlay, an  
13:49:28 9 acetate overlay here. And what does the overlay tell  
13:49:32 10 us about the white piece of paper below it?

13:49:36 11 A. The overlay is showing just what was with  
13:49:39 12 Finkbeiner. It's just showing you how much the land  
13:49:44 13 was impacted with this filling of this drainage swell.

13:49:48 14 Q. Okay. All right. So this document, Exhibit C,  
13:49:54 15 demonstrates how it impacts the drainage. Exhibit O is  
13:49:59 16 the encroachment document?

13:50:02 17 A. Correct.

13:50:04 18 Q. Okay. I just wanted to make sure I understood.

13:50:08 19 Mr. Babcock, anything else on here that you need  
13:50:11 20 to explain?

13:50:12 21 A. No, sir.

13:50:13 22 Q. Thank you. Resume your seat if you would.

13:50:26 23 In summary, sir, were you able to reach opinions  
13:50:28 24 to a reasonable degree of certainty in the field of  
13:50:31 25 survey work as to whether there was, in fact, an

13:50:34 1 encroachment at all?

13:50:38 2 A. As for being an encroachment, I'd have to say  
13:50:45 3 that the guys honored existing corridor standards that a  
13:50:48 4 survey company would do. We didn't encroach  
13:50:52 5 intentionally. We -- if anything, we looked out for the  
13:50:54 6 wellbeing of any of the public that we were going next  
13:50:57 7 to.

13:51:01 8 Q. Let me just directly ask you: Did the  
13:51:04 9 subcontractor of the City's contractor, so far as you  
13:51:07 10 were able to tell, go even as much as an inch in  
13:51:13 11 Cambridge property determined by their own monuments?

13:51:16 12 A. By their own monuments, yes.

13:51:17 13 Q. How deep, was that, the zero to .4 that you were  
13:51:22 14 talking about?

13:51:23 15 A. Yes, sir.

13:51:23 16 MR. ROBON: You're speaking so fast I didn't  
13:51:26 17 even hear.

13:51:27 18 MR. BAHRET: I'll let you give the answer  
13:51:28 19 instead of me anyway. I think the Judge would prefer  
13:51:31 20 that.

13:51:31 21 A. As for the area per their monumentation,  
13:51:35 22 basically I ascertained that we went from about a  
13:51:40 23 240-foot stretch at a zero mark where we basically have  
13:51:44 24 the bearings matching to about 33/100, which is almost  
13:51:50 25 four inches to the north.

13:51:51 1 Q. So we're not talking four feet or five feet;  
13:51:53 2 we're talking at most four inches?

13:51:57 3 A. Yes, sir.

13:51:57 4 Q. And are you familiar with the plat map?

13:52:02 5 A. I've seen the plat but not that particular one,  
13:52:06 6 not that drawing.

13:52:07 7 Q. So the jury understands, the area where you're  
13:52:12 8 saying there may have been perhaps as much as a  
13:52:16 9 four-inch encroachment is actually down here on -- where  
13:52:23 10 the angle in the subdivision is?

13:52:27 11 THE COURT: What lot number is that?

13:52:29 12 MR. BAHRET: 16.

13:52:31 13 Q. Are you aware, for example, the plaintiffs do not  
13:52:33 14 claim there was an encroachment on that lot?

13:52:36 15 A. No.

13:52:36 16 Q. Okay.

13:52:39 17 A. I thought he owned both.

13:52:42 18 Q. He does. But he doesn't claim it. Now, as we  
13:52:46 19 move down this way counting down on the lots, from 16,  
13:52:51 20 15, 14, the alleged encroachment or whatever maximum  
13:52:57 21 numbers it could be according to your calculations  
13:53:00 22 actually gets less?

13:53:02 23 A. Yes, sir.

13:53:03 24 Q. Approximately how far down is it?

13:53:05 25 A. From that corner, the corner of the subdivision,

13:53:08 1 about 245 feet.

13:53:10 2 Q. I assume you probably cannot tell us what lot  
13:53:13 3 number that would be?

13:53:15 4 A. It's on my drawing. Not the lot number, but you  
13:53:20 5 can associate that zero number to a lot.

13:53:23 6 Q. But it's 245 feet. Okay. Have you seen this  
13:53:32 7 drawing, Peterman's Exhibit Number -- or it's made by  
13:53:36 8 Peterman, Exhibit Number 7?

13:53:37 9 A. I've seen a blueprint copy unsigned. This is  
13:53:41 10 the first signed copy I've seen.

13:53:43 11 Q. Okay. Say that again. You saw a what?

13:53:45 12 A. A blueprint copy unsigned. It wasn't stamped or  
13:53:50 13 anything. So it must have been before.

13:53:53 14 Q. But the information is the same?

13:53:55 15 A. I can't tell you that because I didn't scan that  
13:53:57 16 picture as close as I did the original.

13:53:59 17 Q. Did you, in fact, get in electronic format  
13:54:02 18 Peterman's data to check?

13:54:05 19 A. I got a PDF.

13:54:09 20 Q. Is that electronic?

13:54:11 21 A. Yes.

13:54:11 22 Q. Did you check that data?

13:54:12 23 A. Yes, I looked at it. Like I said, I can't  
13:54:15 24 testify that that drawing is the same.

13:54:17 25 Q. Did you agree or do you now agree or disagree



13:54:21 1 with any conclusion that he apparently reached, Nick  
13:54:25 2 Nigh, I guess, of four- to six-foot encroachments?

13:54:31 3 A. I don't see how four to six feet could have came  
13:54:34 4 out of that. There's no way. But like I said, by the  
13:54:40 5 time we went out to occupy actual stumps that had been  
13:54:43 6 supposedly chopped by our clearing crew, being the City  
13:54:47 7 of Toledo's consultant, they were already covered.  
13:54:51 8 Everything was obliterated. It was -- it wasn't much  
13:54:57 9 more time than a week.

13:54:58 10 Q. Okay.

13:54:59 11 A. At first we went out on the assumption that, Did  
13:55:02 12 we? And that was my own doing because I wanted to make  
13:55:05 13 sure we didn't do something. And I sent the crew out  
13:55:09 14 without even Christy's knowledge just so we can make  
13:55:11 15 sure that we didn't have a problem like we're pursuing  
13:55:14 16 today. And we shot their monuments. And then we came  
13:55:18 17 back in, and we started working on it.

13:55:20 18 The next thing I know I'm getting ready to send a  
13:55:23 19 crew back up, and there was dirt already covering up  
13:55:27 20 those stumps. If there were stumps caused by our crew  
13:55:31 21 and not the ones that brought the dirt in --

13:55:33 22 Q. That dirt was primarily down on -- in the area  
13:55:36 23 where the spec house is?

13:55:39 24 A. If that's a spec house, yes. There was a  
13:55:42 25 resident living in it from what I understand.

13:55:45 1 Q. I'll just say the house. You wouldn't know.

13:55:48 2 The rest of the range to your left, if I'm on the  
13:55:50 3 railroad facing the development, dirt had not been  
13:55:53 4 dumped on there after the clearing, and you were able to  
13:55:57 5 see whatever evidence was there?

13:55:58 6 A. Yes, sir.

13:55:58 7 Q. And made your determination that there's no  
13:56:01 8 encroachment down there?

13:56:02 9 A. We made our determination to pick up existing  
13:56:05 10 monumentation. Like I said, we didn't pick up any  
13:56:09 11 stumps at that time, which I wish we could have done and  
13:56:13 12 occupied those stumps if there were any from our  
13:56:16 13 clearing because once the dirt was brought in, they had  
13:56:19 14 to doze over any existing vegetation, but there was  
13:56:22 15 hardly any vegetation on that particular lot as it was.

13:56:28 16 Q. Now, did you have anything to do with the other  
13:56:30 17 issue that we're focusing on in this case, that  
13:56:34 18 crossover pipe?

13:56:34 19 A. Sir, I have no actual knowledge of that. Other  
13:56:37 20 than driving by it, I don't know anything else about  
13:56:40 21 that.

13:56:40 22 Q. You had no part in studying anything about that  
13:56:43 23 pipe?

13:56:43 24 A. No, sir.

13:56:45 25 MR. BAHRET: Thank you. I have no other

13:56:46 1 questions.

13:56:50 2 THE COURT: You may inquire.

13:56:51 3 MR. ROBON: Thank you, Your Honor.

13:56:53 4 - - -

13:56:53 5 ROBERT BABCOCK, CROSS-EXAMINATION

13:56:54 6 BY MR. ROBON:

13:56:54 7 Q. What you've produced here for the jury is not  
13:56:56 8 really a survey, is it?

13:56:57 9 A. It's a survey of that subdivision. It's a  
13:57:01 10 survey of the relativity of that subdivision to the  
13:57:04 11 existing railroad fence.

13:57:05 12 Q. Isn't it really a drawing?

13:57:07 13 A. No, sir. I guess in a way it is a drawing, yes.

13:57:12 14 Q. I don't see any registration, survey number,  
13:57:16 15 certification, date.

13:57:18 16 A. Correct.

13:57:19 17 Q. So it's not a survey?

13:57:20 18 A. Because I asked my attorney if that would be an  
13:57:22 19 appropriate drawing to submit, and he said yes.

13:57:27 20 Q. Do you have a seal?

13:57:28 21 A. Yes, sir.

13:57:29 22 Q. It's not on there, right?

13:57:30 23 A. No, sir.

13:57:31 24 Q. And a seal means that it would be accurate.

13:57:37 25 What you presented today is simply just a sketch?

13:57:41 1 MR. BAHRET: Objection.

13:57:42 2 A. No, sir.

13:57:47 3 THE COURT: He's answered. The objection  
13:57:49 4 is overruled.

13:57:52 5 Q. Yes?

13:57:52 6 A. No, sir.

13:57:53 7 THE COURT: He said no. "No, sir" is what  
13:57:55 8 he said.

13:57:57 9 BY MR. ROBON:

13:57:57 10 Q. You seem to be blaming the dirt that was brought  
13:58:00 11 in as being -- covering up the stumps. You indicated  
13:58:06 12 that you were out there before the dirt was moved, and  
13:58:10 13 you shot the two monuments. Now, by shooting it, I'm  
13:58:15 14 assuming you set a transit or some other machine tool on  
13:58:22 15 top of one of the survey stakes, the monuments, and did  
13:58:28 16 at the other, and looked down, like, a laser line; is  
13:58:31 17 that right?

13:58:31 18 A. No, sir.

13:58:32 19 Q. What did you do when you shot it?

13:58:34 20 A. We shot it with a GPS, subcentimeter accurate GPS  
13:58:40 21 unit, and then we offset between the two points, and we  
13:58:43 22 could stake to that line within a hundredth.

13:58:47 23 Q. But you didn't stake it at that point in time?

13:58:50 24 A. No, sir, because at that time it was not an issue  
13:58:53 25 to pick up all the stumps. It was to make sure where

13:58:56 1 the line of the subdivision was.

13:58:57 2 Q. Well, they're out there for a purpose, right,  
13:59:04 3 because somebody complained? Yes or no?

13:59:07 4 A. It was just in its infancy.

13:59:09 5 Q. That's not my point. You're out there because  
13:59:13 6 someone complained and said the City cut down trees on  
13:59:16 7 their property, yes or no?

13:59:17 8 A. Then no. If you want a yes or no answer, then  
13:59:20 9 no. I went throughout because I heard through the  
13:59:22 10 inspector that I should go out. I took it upon myself  
13:59:25 11 to step out there and make sure that we pick up these  
13:59:28 12 monumentations to see if there is a need for any further  
13:59:31 13 investigation.

13:59:32 14 Q. You wanted to go out there before anything  
13:59:34 15 happened so you could make sure you could cover up  
13:59:38 16 anything that occurred?

13:59:41 17 A. No, sir.

13:59:41 18 MR. BAHRET: Objection.

13:59:46 19 THE COURT: He's answered. The objection  
13:59:48 20 is overruled.

13:59:48 21 MR. ROBON: I'm sorry?

13:59:49 22 THE COURT: I said he's answered. The  
13:59:51 23 objection is overruled.

13:59:53 24 Q. Did you take any pictures of the stumps?

13:59:58 25 A. Yes, sir. There's photos that should be

14:00:01 1 submitted in the exhibits. I personally took a couple.

14:00:04 2 Q. You did?

14:00:05 3 A. Of not the stumps themselves, but as looking  
14:00:09 4 towards the house. I remember taking those photos.

14:00:11 5 Q. When did you take those?

14:00:13 6 A. Sir, that's two years ago. I'd have to say  
14:00:17 7 February, March, somewhere in there.

14:00:19 8 Q. Before the clearing?

14:00:21 9 A. I really can't tell you the exact date to the  
14:00:23 10 best of my recollection. I was just giving you an  
14:00:26 11 approximate date.

14:00:27 12 Q. Do you know when the clearing took place?

14:00:29 13 A. To the exact date, no, sir.

14:00:31 14 Q. The month?

14:00:32 15 A. Not 100 percent, no. When they were through  
14:00:35 16 that section, no.

14:00:37 17 Q. So let me get this straight. You didn't go out  
14:00:41 18 and tie the ribbons on the line the first time?  
14:00:45 19 Somebody else did that?

14:00:46 20 A. Correct.

14:00:50 21 Q. Then there's a complaint after the clearing  
14:00:52 22 occurs, and you went out with whom?

14:00:57 23 A. With the GPS unit I sent the crews out.

14:01:00 24 Q. Did you go too?

14:01:01 25 A. No, sir. I got a crew that goes out and does

14:01:04 1 these occupations.

14:01:05 2 Q. So you can't personally testify as to what was  
14:01:10 3 there when you say you shoot? You didn't shoot  
14:01:13 4 anything; your crew shot, correct?

14:01:16 5 A. Correct.

14:01:16 6 Q. So you're misleading this jury when you say "I  
14:01:20 7 shot." You didn't shoot anything, did you?

14:01:22 8 MR. BAHRET: Objection.

14:01:23 9 THE COURT: I'll sustain the objection.  
14:01:25 10 You may ask a question, but comments, counsel, are  
14:01:28 11 unnecessary, for both sides.

14:01:34 12 BY MR. ROBON:

14:01:34 13 Q. You did not shoot?

14:01:35 14 A. Being their supervisor, I instructed them to  
14:01:37 15 occupy that monumentation.

14:01:39 16 Q. I understand.

14:01:40 17 A. Therefore, maybe, yes, I did misspeak by saying  
14:01:43 18 when I did the calculations that I shot. Yes.  
14:01:46 19 Physically I was not out there on that particular  
14:01:49 20 moment.

14:01:49 21 Q. On these pieces of paper that you have drawings  
14:01:53 22 on, that is based upon what someone else did?

14:01:58 23 A. Yes, sir.

14:01:59 24 Q. You didn't do it yourself?

14:02:01 25 A. Yes, sir.

14:02:17 1 Q. And you didn't instruct your crew when they found  
14:02:20 2 the corner monuments on the Cambridge Subdivision to run  
14:02:25 3 a staking line to see whether the stumps are, on which  
14:02:28 4 side of the line, right?

14:02:29 5 A. At that particular moment when we went out to  
14:02:32 6 pick up the monumentation in the subdivision --

14:02:36 7 Q. Answer it yes or no.

14:02:37 8 THE COURT: We're getting into a problem.  
14:02:39 9 The problem is we're tripping over each other. I would  
14:02:42 10 think we would understand -- and I'm talking to the  
14:02:45 11 lawyers -- how its works. Let the witness finish an  
14:02:49 12 answer, and the lawyer may begin the next question.  
14:02:51 13 And the witness should allow the lawyer to finish the  
14:02:53 14 question before the next answer begins. That having  
14:02:57 15 been said, let's go back and start over please.

14:02:59 16 MR. ROBON: I didn't believe the witness was  
14:03:01 17 being responsive, Your Honor.

14:03:05 18 BY MR. ROBON:

14:03:06 19 Q. My question is, you did not instruct your crew  
14:03:10 20 when they found the corner monuments on each corner of  
14:03:14 21 the subdivision to run stakes, survey stakes down so  
14:03:18 22 anybody that would walk out there could see if the stump  
14:03:22 23 is on this side or this side, correct?

14:03:25 24 A. I did not tell them to stake this property line,  
14:03:30 25 that is correct.



14:03:31 1 Q. You've given an excuse that the stumps --

14:03:35 2 MR. BAHRET: Objection.

14:03:36 3 Q. -- were subsequently covered up with --

14:03:41 4 THE COURT: Overruled. You may proceed.

14:03:44 5 Q. You gave an excuse that the stumps were covered  
14:03:47 6 up with mud so you couldn't locate them any longer,  
14:03:52 7 correct?

14:03:52 8 A. Not mud.

14:03:54 9 Q. Earth?

14:03:54 10 A. He said dirt. They were covered with probably  
14:03:58 11 two feet of dirt.

14:04:00 12 Q. That's what I'm saying, mud?

14:04:02 13 A. There's a difference.

14:04:03 14 Q. Did you ever go back in the last 20 months since  
14:04:06 15 those stumps were uncovered with a backhoe and run a  
14:04:12 16 survey line and check where those stumps were? You can  
14:04:20 17 answer that yes or no. You either did or didn't?

14:04:22 18 A. How do I know which did it, the dozer or us?

14:04:25 19 Q. I asked you a question, sir.

14:04:27 20 A. No.

14:04:28 21 Q. In the last 20 months after Mr. McCarthy went  
14:04:31 22 back there with a backhoe and excavated where those  
14:04:34 23 stumps were, did you go back and survey the property,  
14:04:38 24 yes or no?

14:04:38 25 A. No.

14:04:40 1 MR. ROBON: No further questions.

14:04:44 2 MR. BAHRET: Briefly.

14:04:45 3 - - -

14:04:45 4 ROBERT BABCOCK, REDIRECT EXAMINATION

14:04:46 5 BY MR. BAHRET:

14:04:46 6 Q. Mr. Babcock, you were asked if you put your magic  
14:04:50 7 seal on here, if that does anything. Does the  
14:04:54 8 information get any better or any worse if you put your  
14:04:56 9 seal on it?

14:04:56 10 A. No, sir.

14:04:57 11 Q. Are these documents prepared within the scope  
14:05:03 12 recognized by your profession? I mean, are they  
14:05:07 13 accurate?

14:05:07 14 A. With the data that was collected, yes. Because  
14:05:11 15 it's a true and accurate measurement.

14:05:14 16 Q. You got the underlying data from the people that  
14:05:17 17 work under you?

14:05:18 18 A. Yes, sir, under my supervision.

14:05:20 19 Q. And is that common? In fact, that's standard  
14:05:24 20 practice in not just your office but in the industry?

14:05:27 21 A. Yes, sir.

14:05:28 22 Q. The individual preparing the drawings frequently  
14:05:32 23 is not the person that gathered the data?

14:05:34 24 A. Correct.

14:05:36 25 Q. And do you stand by these -- well, what would you

14:05:41 1 call these, surveys?

14:05:42 2 A. Yes.

14:05:42 3 Q. Would you stand by your surveys?

14:05:44 4 A. That the topographic drawing is correct to my  
14:05:47 5 knowledge.

14:05:47 6 Q. And the other document, it's O -- I guess it's  
14:05:52 7 over here. Do you stand by this document?

14:05:55 8 A. Yes, sir.

14:05:56 9 Q. And what should we call Exhibit O? Is that a  
14:06:00 10 survey?

14:06:01 11 A. That's an existing topography.

14:06:03 12 Q. Say again?

14:06:04 13 A. A topo map. Topography.

14:06:07 14 Q. This one?

14:06:08 15 A. Yes, with delineations for property lines.

14:06:11 16 MR. BAHRET: Thank you. I have no other  
14:06:12 17 questions.

14:06:18 18 - - -

14:06:18 19 ROBERT BABCOCK, RECROSS-EXAMINATION

14:06:19 20 BY MR. ROBON:

14:06:19 21 Q. Would you tell the jury how many times you were  
14:06:22 22 personally at the Cambridge Subdivision site?

14:06:24 23 MR. BAHRET: Outside the scope.

14:06:26 24 THE COURT: He may answer. How many times  
14:06:27 25 were you there?

14:06:28 1 A. Three times; three, four times that I'd have to  
14:06:31 2 say with the encroachment issue before it became a  
14:06:36 3 ballooned issue where we had to start spending more time  
14:06:40 4 on it because we were also pushing the waterline further  
14:06:43 5 north.

14:06:44 6 Q. So you were there three or four times. Were you  
14:06:47 7 there just to walk by, or did you do any instrumentation  
14:06:50 8 yourself?

14:06:51 9 A. No, sir, that's why I have a survey crew.

14:06:56 10 Q. So when they had their machines up, you didn't go  
14:07:01 11 over and look through and see a delineation of stumps on  
14:07:07 12 one side or the other?

14:07:08 13 A. No, sir. We do this with GPS.

14:07:11 14 Q. How often do you test your GPS to make certain  
14:07:14 15 that it's working accurately?

14:07:15 16 A. Actually that particular unit was just purchased.

14:07:20 17 Q. Just purchased?

14:07:21 18 A. Yes, sir, from City Blue. It was a brand new  
14:07:26 19 unit.

14:07:27 20 Q. How often do you have them checked?

14:07:29 21 A. We try to get our equipment checked every year.

14:07:34 22 Q. And GPS units can be -- have errors, correct?

14:07:41 23 A. I'm sure anything can have errors.

14:07:58 24 Q. Could you explain to the jury what the purpose of  
14:08:00 25 sealing a survey and signing it and dating it is?

14:08:04 1 A. The purpose of signing a survey is to prove that  
14:08:06 2 the information shown on the plan is true and accurate  
14:08:09 3 to the best of your knowledge.

14:08:18 4 Q. And it's required by the State of Ohio, correct?

14:08:23 5 A. Yes, sir, it is required by the State of Ohio  
14:08:26 6 when you're submitting it for a client.

14:08:30 7 MR. ROBON: No further questions.

14:08:33 8 THE COURT: You may step down. Thank you.

14:09:12 9 (The witness was sworn by the clerk.)

14:09:16 10 - - -

14:09:16 11 JOSEPH CRANDALL, DIRECT EXAMINATION

14:09:18 12 BY MR. BAHRET:

14:09:18 13 Q. Sir, could you'll state your full name for the  
14:09:26 14 jury.

14:09:26 15 A. Joseph Crandall.

14:09:28 16 Q. How old are you, sir?

14:09:29 17 A. How old am I? 60 years old.

14:09:37 18 Q. And what sort of educational background do you  
14:09:39 19 have?

14:09:40 20 A. High school diploma, some college, a few  
14:09:45 21 engineering classes, training thing on how to be an  
14:09:50 22 inspector at the University of Toledo.

14:09:53 23 Q. By whom are you employed?

14:09:54 24 A. City of Toledo.

14:09:55 25 Q. How long have you been employed by Toledo?

14:09:58 1 A. 30 years.

14:09:59 2 Q. In what capacity are you presently employed?

14:10:03 3 A. Construction tech, which is an inspector.

14:10:06 4 Q. Could you basically describe in abbreviated form,  
14:10:11 5 please, what does a construction inspector do?

14:10:15 6 A. I'm kind of the person that works with the  
14:10:20 7 private contractor to see that they're doing the job  
14:10:23 8 according to the City's specifications and --

14:10:28 9 Q. Are you the on-site guy then?

14:10:31 10 A. Yes, I'm the day-to-day on-site person.

14:10:34 11 Q. And in this case you had involvement with the  
14:10:38 12 Toledo water main project involved behind Cambridge?

14:10:43 13 A. Yes, sir.

14:10:45 14 Q. Do you know where that water main -- where it  
14:10:48 15 comes from and where it goes to?

14:10:52 16 A. As we laid it or as the water flows? It goes  
14:10:58 17 from our College Park pumping station to a valve on  
14:11:04 18 River Road in the City of Toledo as the water flows.  
14:11:09 19 The pipe was installed actually in the reverse order.  
14:11:13 20 We started on River Road and came across Toledo  
14:11:18 21 underneath the Maumee River, heading towards White Road  
14:11:22 22 and heading then towards Bates Road as the pipe was  
14:11:25 23 installed.

14:11:26 24 Q. Okay. So you mentioned River Road twice.

14:11:30 25 There's a River Road on both sides of the river?

14:11:32 1 A. Yes, West River Road, East River Road.

14:11:35 2 Q. So the pipe actually goes from east Toledo  
14:11:37 3 through Wood County under the river and back to the City  
14:11:41 4 of Toledo?

14:11:41 5 A. Yes, sir.

14:11:41 6 Q. Okay. Do you recall the construction process as  
14:11:51 7 it was near Cambridge?

14:11:53 8 A. Yes, sir.

14:11:54 9 Q. Now, you had nothing to do with staking or  
14:11:56 10 clearing the land, did you?

14:11:58 11 A. No, sir.

14:11:59 12 Q. After -- were you there after the clearing was  
14:12:02 13 done but before Ric-man brought in pipes and began the  
14:12:06 14 construction?

14:12:07 15 A. Yes, sir.

14:12:08 16 Q. After the clearing were the markings -- any of  
14:12:11 17 the markings still evident behind Cambridge that had  
14:12:14 18 been placed by City crews?

14:12:19 19 A. I saw some flags, little pieces of ribbon that  
14:12:23 20 they had tied at various points that normally would  
14:12:27 21 indicate how far they could clear the land to.

14:12:31 22 Q. Okay. And tell us about the first involvement  
14:12:37 23 you had with any dispute between the contractors,  
14:12:43 24 including Toledo, I'll say, and Cambridge. What was  
14:12:50 25 the first problem that arose, if you know?

14:12:53 1 A. I would say it probably was in force when we had  
14:12:57 2 a meeting to discuss what went on behind the Cambridge  
14:13:00 3 property and possibly some drainage issues from a pipe  
14:13:05 4 that was discovered after they had cleared.

14:13:08 5 Q. What was the issue for the drainage issue then?

14:13:11 6 A. The main issue was there was a pipe existing in  
14:13:15 7 the ground that we were going to cross with our larger  
14:13:21 8 pipe. And we needed to know how that would be taken  
14:13:25 9 care of.

14:13:26 10 Q. Okay. So who was at the meeting? Approximately  
14:13:30 11 when was the meeting?

14:13:31 12 A. I would say mid to late May.

14:13:35 13 Q. And who was there?

14:13:38 14 A. Myself, Christy, Dean from Ric-man.

14:13:44 15 Q. Dean Walsh?

14:13:46 16 A. Dean Walsh from Ric-man, and the Wood County  
14:13:49 17 engineer.

14:13:50 18 Q. Ray Huber?

14:13:51 19 A. Correct. And of course Mr. McCarthy.

14:13:55 20 Q. Do you recall the general discussion?

14:14:00 21 A. Sure. Generally they wanted to know how we were  
14:14:06 22 going to handle that pipe when we got there, whether  
14:14:10 23 water flowed from their property onto railroad property  
14:14:14 24 or whether the water flowed from the railroad property  
14:14:17 25 onto their property, or the neighbor's property.



14:14:23 1 Q. And what did the Wood County engineer indicate he  
14:14:27 2 believed?

14:14:27 3 A. I thought he said he had some early records of  
14:14:32 4 that. If anything, it flowed from the railroad  
14:14:35 5 property onto the neighbor's property or the Cambridge  
14:14:38 6 property.

14:14:43 7 Q. Was there any particular study done at that  
14:14:47 8 point, or just that was the end of the meeting, or what?

14:14:52 9 A. Well, we knew we would be laying our pipe, and  
14:14:55 10 eventually we will be digging that pipe up, and we could  
14:14:59 11 make a determination then, what we found as we got  
14:15:06 12 there.

14:15:07 13 Q. And so the jury understands, even if that pipe  
14:15:11 14 was viable and serving a useful function, it was still  
14:15:15 15 going to be broken to lay the water main, correct?

14:15:19 16 A. Correct.

14:15:20 17 Q. And then if it was viable, would you replace it?

14:15:23 18 A. Yes, sir.

14:15:24 19 Q. Okay. What was determined? Were you there when  
14:15:27 20 they -- Ric-man got there and exposed that pipe, broke  
14:15:32 21 it?

14:15:32 22 A. Not exactly at that particular moment.

14:15:38 23 Q. Okay. Did you get there shortly thereafter?

14:15:40 24 A. Shortly thereafter. It was one of the first  
14:15:44 25 things they had -- they had stopped one pipe short of

14:15:47 1 that pipe the night before. So it was going to be  
14:15:50 2 their first or possibly their second pipe.

14:15:52 3 Q. When you say one pipe short of that pipe, what  
14:15:56 4 are you talking about?

14:15:57 5 A. I'm sorry. Pipes are 20 feet long. So we were  
14:16:01 6 within 20 to 40 feet of where we think we would cross it  
14:16:05 7 the night before. We knew it was coming up the next  
14:16:09 8 day.

14:16:09 9 Q. Okay. So this, the encounter with the crossover  
14:16:12 10 pipe, then, I'm assuming, happened early in a particular  
14:16:16 11 day?

14:16:16 12 A. Yes, sir. I'd say in the first two to three  
14:16:19 13 hours.

14:16:20 14 Q. Okay. And tell us what happened then when you  
14:16:25 15 arrived.

14:16:26 16 A. Okay. Ric-man had more than one crew working  
14:16:29 17 that day. So I was at a different location at the  
14:16:34 18 beginning of the day that first hour. As I got back to  
14:16:37 19 where the main crew was laying the pipe, Pete's crew,  
14:16:43 20 they had crossed the pipe already. They were on -- one  
14:16:48 21 pipe past it, approximately one pipe past that point.

14:16:54 22 Some pipe of the small pipe, what I call the  
14:16:58 23 18-inch pipe that went across there, was laying -- they  
14:17:01 24 had dug it up, and it was sitting on top of the ground.  
14:17:05 25 So I didn't actually see them dig it out of the ground,

14:17:07 1 but I did see the pipe that was laying on top of the  
14:17:10 2 ground that they, I assume, had dug out of the ground.

14:17:13 3 Q. And what did it look like?

14:17:15 4 A. That pipe was completely filled with debris or  
14:17:21 5 mud or dirt.

14:17:26 6 Q. Did it look like it had any useful function in  
14:17:29 7 that condition?

14:17:30 8 A. No, sir.

14:17:31 9 Q. So what decision was made?

14:17:34 10 A. Since the pipe was completely filled, there was  
14:17:37 11 no need to replace the pipe.

14:17:41 12 Q. And did the railroad have inspectors on-site?

14:17:44 13 A. Yes, sir.

14:17:46 14 Q. And did the inspector object to that decision?

14:17:50 15 MR. ROBON: Objection.

14:17:51 16 A. No.

14:17:56 17 MR. ROBON: Hearsay, Your Honor.

14:17:58 18 MR. BAHRET: It's not hearsay. I didn't  
14:18:00 19 ask what he said.

14:18:00 20 THE COURT: Well, were they all present  
14:18:02 21 together? If so, he can answer it.

14:18:06 22 BY MR. BAHRET:

14:18:06 23 Q. Did you have discussions with the railroad  
14:18:08 24 inspector about that pipe?

14:18:11 25 A. I believe I did.

14:18:13 1 Q. Did he object?

14:18:14 2 A. No, sir.

14:18:15 3 Q. Has he ever objected even in hindsight?

14:18:18 4 A. No, sir.

14:18:19 5 Q. Has anybody from the railroad objected to this  
14:18:22 6 day?

14:18:22 7 A. No, sir.

14:18:24 8 Q. So did you participate in the decision to go  
14:18:28 9 ahead and -- I've heard the term "bulkhead" that pipe?

14:18:32 10 A. Yes, sir.

14:18:34 11 Q. Incidentally, when there was thought about what  
14:18:38 12 may be under there from this manhole and there was the  
14:18:41 13 meeting, did anybody make an effort to look in the ditch  
14:18:45 14 to see if there's an exit pipe coming out into the ditch  
14:18:49 15 between the inactive railroad bed and the active  
14:18:53 16 railroad.

14:18:54 17 A. Yes, sir. That pipe came out to that ditch.

14:18:56 18 Q. Okay. And did you see it?

14:18:59 19 A. I saw the pipe.

14:19:02 20 Q. Did it appear that it was open or plugged?

14:19:05 21 A. On a dry day with no flow, you could not tell.  
14:19:12 22 I went out there in June. I know there was a day when  
14:19:15 23 we got three inches of rain. I personally went through  
14:19:20 24 to look to see if water was coming out of that pipe,  
14:19:23 25 which would indicate to me that it was flowing.

14:19:27 1 Q. What did you see?

14:19:28 2 A. I saw no water coming out of that pipe.

14:19:30 3 Q. And you're talking about the area between the two  
14:19:33 4 road beds, the railroad beds, the ditch between the  
14:19:37 5 active railroad and the inactive?

14:19:39 6 A. Yes, sir.

14:19:41 7 Q. So even on a day where it was raining, nothing  
14:19:45 8 was moving through that pipe?

14:19:47 9 A. Correct.

14:19:49 10 MR. BAHRET: Thank you. I have no other  
14:19:51 11 questions.

14:19:52 12 - - -

14:19:52 13 JOSEPH CRANDALL, CROSS-EXAMINATION

14:19:53 14 BY MR. ROBON:

14:19:53 15 Q. Mr. Crandall?

14:19:56 16 A. Yes, sir.

14:19:56 17 Q. Did you take any photographs for the jury of the  
14:20:01 18 pipe that you looked at?

14:20:05 19 A. Which pipe are we talking?

14:20:07 20 Q. The pipe that you saw dug up by Ric-man.

14:20:10 21 A. No, sir.

14:20:11 22 Q. You knew there was a dispute because Mr. McCarthy  
14:20:16 23 was there with you, what, a few hours before it was dug  
14:20:20 24 up?

14:20:20 25 A. No, sir, not that I know of.

14:20:22 1 Q. How many -- the meeting that you had with Mr.  
14:20:25 2 McCarthy and Mr. Huber, when did that occur?

14:20:30 3 A. May.

14:20:31 4 Q. That was before -- it was a month before?

14:20:34 5 A. Before we got there? We got there in August.

14:20:38 6 Q. So it was two months before or three months  
14:20:40 7 before?

14:20:41 8 A. Yes, sir.

14:20:44 9 Q. And during that two to three months, from the  
14:20:47 10 time Mr. Huber and Mr. McCarthy and you and Ric-man and  
14:20:51 11 the railroad all met, what did you do or what did the  
14:20:55 12 City of Toledo do to investigate where that manhole  
14:21:02 13 exited to?

14:21:11 14 A. I looked at the manhole.

14:21:13 15 Q. What did you do?

14:21:14 16 A. The manhole was full of mud and dirt. And so we  
14:21:17 17 tried, along with Dean Walsh, we tried to probe down it  
14:21:24 18 to probe to find any pipes that entered or left that  
14:21:33 19 structure. The only pipe that we saw was the pipe that  
14:21:36 20 ran, what I would say, across where we were going to lay  
14:21:39 21 our waterline and go to the large ditch between the  
14:21:43 22 inactive railroad and the active railroad.

14:21:45 23 Q. So you saw -- you knew the pipe was there?

14:21:48 24 A. Yes, sir.

14:21:49 25 Q. You just didn't know which way the water flowed?

14:21:52 1 A. Correct.

14:21:53 2 Q. Now, my next question is, if the water would have  
14:22:00 3 flowed north, towards the Cambridge Subdivision, there  
14:22:04 4 would have to be a pipe in the ground someplace for that  
14:22:07 5 water to go, correct?

14:22:10 6 A. I don't know that.

14:22:12 7 Q. Well, I mean, the water wouldn't just collect in  
14:22:16 8 the manhole, would it?

14:22:17 9 A. Not normally.

14:22:19 10 Q. No, I mean, it would come into the manhole and go  
14:22:22 11 someplace, right?

14:22:23 12 A. Yes, sir.

14:22:24 13 Q. Did you think about using a dye test?

14:22:29 14 A. No, sir.

14:22:34 15 Q. I've heard several different versions when people  
14:22:37 16 look down in the pipe. Mr. Forletta yesterday said it  
14:22:41 17 was full of garbage. Mr. Walsh said it was water.  
14:22:45 18 Mr. McCarthy said it was water. Now you're telling me  
14:22:48 19 it was full of mud. Which is right?

14:22:52 20 A. Maybe all of them are right. It was quite --

14:22:59 21 Q. Deep?

14:22:59 22 A. No, sir. Not that I could see. It --

14:23:03 23 Q. How deep do you think it was?

14:23:05 24 A. Four to five feet.

14:23:11 25 Q. Did have you a flashlight?

14:23:12 1 A. Yes, sir.

14:23:13 2 Q. Did you shine the flashlight down in it?

14:23:16 3 A. Yes, sir. Dirt/mud prevented going any further.

14:23:21 4 Q. Was there water also in it?

14:23:24 5 A. There could have been some water in it.

14:23:26 6 Q. You just don't remember?

14:23:27 7 A. Yes, sir.

14:23:30 8 Q. Did you save the pipe -- start over.

14:23:33 9 How long was the piece of pipe that you saw that  
14:23:39 10 Ric-man had dug out and laid up on top when you said it  
14:23:46 11 was full of mud?

14:23:47 12 A. Thirty inches.

14:23:48 13 Q. Thirty inches. You could have picked that up  
14:23:51 14 and put it in the back of your pickup truck?

14:23:53 15 A. No, sir.

14:23:54 16 Q. Why not?

14:23:55 17 A. Eighteen-inch pipe. I don't have a pickup,  
14:24:02 18 first of all.

14:24:02 19 Q. But they could have preserved that pipe, could  
14:24:05 20 they not have, with a front-end loader, put it on  
14:24:10 21 something?

14:24:10 22 A. I guess they could have.

14:24:12 23 Q. Now, you said it was an 18-inch pipe. Everybody  
14:24:16 24 else told me it's a 24-inch pipe. Is your recollection  
14:24:24 25 wrong?



14:24:25 1 A. It could possibly be wrong. I remember it as an  
14:24:28 2 18-inch pipe. The structure, what everyone's calling a  
14:24:33 3 manhole, was 24 inches, which was really some pipe laid  
14:24:39 4 down in vertically.

14:24:41 5 Q. What do you think the cost would have been to the  
14:24:44 6 City of Toledo when that pipe was dug up to put a new  
14:24:51 7 pipe across and just put the waterline down three or  
14:24:57 8 four feet deeper?

14:25:01 9 A. I don't know what the cost would be. There was  
14:25:03 10 no need to do that.

14:25:05 11 Q. Well, you'd have to buy a piece of pipe about 20  
14:25:08 12 feet long, wouldn't you?

14:25:10 13 A. To move a 66-inch water main four feet?

14:25:14 14 Q. Yeah.

14:25:15 15 A. I think you would have to use bends. You would  
14:25:19 16 have to use bends to make it go -- to get it down that  
14:25:26 17 quick.

14:25:28 18 Q. Well, let me ask it this way. How much money  
14:25:31 19 did the City of Toledo save by not replacing the  
14:25:36 20 crossover pipe?

14:25:37 21 A. I don't know that we saved any money.

14:25:44 22 Q. And you have no idea what it would have cost to  
14:25:47 23 replace the pipe?

14:25:49 24 A. To replace the storm pipe?

14:25:51 25 Q. The storm water drainage pipe.

14:25:55 1 A. No, sir.

14:25:58 2 Q. Did you have the authority on the job site to  
14:26:00 3 order that?

14:26:03 4 A. Yes, sir -- well, I don't know if I had the  
14:26:06 5 authority. I would be the first one to bring it to the  
14:26:11 6 City's attention, and then I certainly would call  
14:26:14 7 Christy, and then we would have to decide at that point.

14:26:23 8 MR. ROBON: Your Honor, could I have him  
14:26:24 9 come over here and take a look at this?

14:26:26 10 A. Sure.

14:26:36 11 Q. Stand on the side here so all the jurors can see.  
14:26:43 12 This is the manhole that we're talking about, right?  
14:26:46 13 It's behind the Cambridge Subdivision maybe 100 feet or  
14:26:50 14 so?

14:26:50 15 A. Yes, sir.

14:26:50 16 Q. Now, my question to you is --

14:26:53 17 THE COURT: Voice up, please.

14:27:07 18 BY MR. ROBON:

14:27:09 19 Q. My question to you is: When you knew there was a  
14:27:16 20 question or you weren't sure of which way the water  
14:27:19 21 went, whether it went that way or whether it went that  
14:27:22 22 way, did you take a probing rod -- do you know what a  
14:27:27 23 probing rod is?

14:27:28 24 A. Yes, sir.

14:27:29 25 Q. -- to find field tile? About four or five feet

14:27:32 1 long?

14:27:32 2 A. Yes, sir.

14:27:32 3 Q. It's got a handle on it and you stick it in the  
14:27:35 4 ground, and you see if you hit something. Did anybody  
14:27:40 5 from the City take a probing rod around the outside of  
14:27:44 6 this manhole to determine if there was an exit from the  
14:27:49 7 manhole?

14:27:51 8 A. I did not do that.

14:27:54 9 Q. Would that have been your job to do that or would  
14:27:57 10 that have been the engineer's job?

14:28:04 11 A. There was a pipe inside here. We probed inside  
14:28:09 12 this structure or tried to probe inside this structure  
14:28:14 13 and didn't hit anything.

14:28:15 14 Q. Okay.

14:28:16 15 A. Except the pipe.

14:28:18 16 Q. This pipe here. So you knew, you knew that that  
14:28:23 17 pipe went across to this ditch, correct?

14:28:27 18 A. Yes, sir.

14:28:28 19 Q. Okay. My question is, if the water was flowing  
14:28:34 20 this way, from south to north, into this manhole, it  
14:28:40 21 would have to exit the manhole and go someplace, would  
14:28:44 22 it not? It just doesn't stay in the manhole; am I  
14:28:49 23 right or am I wrong?

14:28:51 24 A. A pipe could have left that manhole.

14:28:53 25 Q. Right. My question is --

14:28:55 1 A. And it could have drained to the open ground.

14:28:58 2 Q. Okay. But did you look, investigate or see any  
14:29:03 3 opening here; or did you probe for any pipe that, you  
14:29:08 4 know, might go out this way?

14:29:10 5 A. I looked, and I -- what I could see on the  
14:29:15 6 surface, and I didn't find anything. And I did not  
14:29:20 7 probe.

14:29:21 8 Q. Do you have a probe?

14:29:24 9 A. Yes, sir.

14:29:28 10 Q. Have you used one in the past?

14:29:30 11 A. Yes, sir.

14:29:31 12 Q. Did you suggest to Christy Soncrant that perhaps  
14:29:33 13 maybe you should have used one or not?

14:29:36 14 A. No, sir.

14:29:39 15 Q. You can have a seat, please.

14:30:04 16 Did Mr. McCarthy at the meeting before the pipe  
14:30:09 17 was dug up express concern that that pipe was part or  
14:30:18 18 helped drain the area behind the Cambridge Subdivision?

14:30:22 19 A. Yes, sir.

14:30:25 20 Q. Did you know he was an engineer?

14:30:27 21 A. No, sir.

14:30:30 22 Q. Did the City of Toledo look upon Mr. McCarthy as  
14:30:35 23 a pest?

14:30:36 24 MR. BAHRET: Objection.

14:30:38 25 THE COURT: Overruled. He may answer.

14:30:40 1 A. No, sir.

14:30:46 2 Q. Did he frequently call you or talk to you?

14:30:49 3 A. No, sir.

14:31:06 4 MR. ROBON: No further questions, Your  
14:31:11 5 Honor.

14:31:11 6 MR. BAHRET: I have no redirect, Your Honor.

14:31:13 7 THE COURT: You may step down. Thank you.  
14:31:17 8 The defendant may call its next witness.

14:31:20 9 MR. BAHRET: May we approach?

14:31:21 10 THE COURT: You may.

14:31:30 11 (Discussion had off the record.)

14:31:42 12 THE COURT: Ladies and gentlemen, the  
14:31:43 13 defendant has one more witness, and we're going to take  
14:31:47 14 a 15-minute break at this point for that, before that  
14:31:50 15 witness takes the stand. It will be our afternoon  
14:31:53 16 break. If things fall right, we might get out of here  
14:31:56 17 a little early tonight. My estimation is we're going  
14:31:59 18 to conclude the evidence this afternoon, and tomorrow  
14:32:03 19 morning you'll get instructions and final arguments and  
14:32:10 20 deliberations. Remember the rules. We're in recess  
14:32:14 21 until 2:45.

14:48:35 22 (Recess taken.)

14:50:20 23 THE COURT: I remind the witness that she  
14:50:21 24 has previously been sworn; therefore, it's not necessary  
14:50:24 25 to do it again. You may inquire.

14:50:26 1 MR. BAHRET: Thank you, Your Honor.

14:50:27 2 - - -

14:50:27 3 CHRISTY SONCRANT, DIRECT EXAMINATION

14:50:27 4 BY MR. BAHRET:

14:50:27 5 Q. Christy?

14:50:35 6 A. Yes.

14:50:35 7 Q. How are you doing today?

14:50:37 8 A. Better. I'm the last one.

14:50:41 9 Q. I don't know how much background information we  
14:50:44 10 got on you; I didn't have it in my notes, so briefly  
14:50:48 11 let's go through that.

14:50:49 12 You went to the University of Toledo for your  
14:50:52 13 degree?

14:50:52 14 A. Yes, I did.

14:50:53 15 Q. And your degree is in what?

14:50:55 16 A. Civil engineering, bachelor of science.

14:50:57 17 Q. And how long have you been an engineer?

14:50:59 18 A. Twelve years.

14:51:02 19 Q. How long have you worked for the City of Toledo?

14:51:04 20 A. Twelve years, plus two years as an intern through  
14:51:08 21 college.

14:51:09 22 MR. ROBON: Could you speak up a little bit,  
14:51:11 23 please.

14:51:13 24 THE WITNESS: Yes.

14:51:14 25 MR. ROBON: Thank you.

14:51:16 1 BY MR. BAHRET:

14:51:16 2 Q. What are your general responsibilities as an  
14:51:19 3 engineer for the City of Toledo, Christy?

14:51:20 4 A. I'm in charge of the waterlines for the City as  
14:51:24 5 in regards to determining which mains each year we  
14:51:28 6 replace of small mains. I'm also in charge of  
14:51:31 7 designing waterlines and construction of waterlines.

14:51:43 8 Q. All right. You had some rather heavy  
14:51:47 9 involvement in the water main project that brings us all  
14:51:50 10 here today; did you not?

14:51:51 11 A. Yes, I did.

14:51:52 12 Q. And you remember some discussion with counsel  
14:51:55 13 about what the purpose of that waterline was for?

14:51:58 14 A. Yes.

14:51:59 15 Q. And was I correct when I indicated earlier that  
14:52:06 16 it starts and ends in Toledo?

14:52:08 17 A. Yes, that's correct.

14:52:09 18 Q. And it does go through Rossford?

14:52:11 19 A. Yes, Perrysburg Township.

14:52:14 20 Q. Does it serve -- does it supply water to anybody  
14:52:17 21 other than Rossford?

14:52:19 22 A. No, just City of Toledo residents and Rossford.

14:52:23 23 Q. And in the Rossford area specifically, forget  
14:52:28 24 about Toledo, you are the City of Toledo, what's the  
14:52:32 25 relationship between Toledo and Rossford with water?

14:52:35 1 A. When it comes to maintaining their waterline, the  
14:52:39 2 City of Toledo workers actually maintain Rossford's  
14:52:42 3 lines as in any new buildings that go in, they tap the  
14:52:47 4 waterlines to give the buildings water. If there is a  
14:52:51 5 main break, the City water crews go out and fix those  
14:52:54 6 water mains.

14:52:55 7 Q. Does Toledo have that type of relationship with  
14:52:57 8 any other municipality?

14:52:58 9 A. No, Rossford is the only one that we do that work  
14:53:01 10 for.

14:53:02 11 Q. And was there a problem in Rossford with water  
14:53:06 12 pressure or anything?

14:53:07 13 A. Actually, the reason we did put a side connection  
14:53:12 14 in this Rossford is LOF is there, and they've had  
14:53:19 15 problems with low pressure in the past, so since the  
14:53:21 16 waterline was going through there, we figured we'd tie  
14:53:25 17 in and help boost LOF.

14:53:27 18 Q. So there's a benefit for one of the larger Toledo  
14:53:31 19 employers in the region?

14:53:32 20 A. That's correct.

14:53:33 21 Q. Let's talk about this crossover pipe. And you  
14:53:37 22 know exactly what I'm talking about if I just say that?

14:53:40 23 A. Yes.

14:53:42 24 Q. Were you at the meeting when it was discussed  
14:53:45 25 that something may be under this abandoned railroad bed



14:53:50 1 before construction began?

14:53:52 2 A. Yes.

14:53:52 3 Q. And Mr. Huber indicated that he told you that if  
14:53:57 4 the water's moving at all, it's moving from the railroad  
14:54:00 5 to the private property?

14:54:02 6 A. That is correct.

14:54:03 7 Q. Did he ever tell you anything contrary to that?

14:54:05 8 A. No, he did not.

14:54:10 9 Q. After the pipe was encountered during  
14:54:13 10 construction, and when it is severed and you can look in  
14:54:17 11 it, what information were you given?

14:54:20 12 A. Joe Crandall informed me that it was full of  
14:54:23 13 dirt.

14:54:26 14 Q. Christy, did you personally see that pipe?

14:54:29 15 A. No, I did not.

14:54:30 16 Q. But your supervisor upon the job indicated that  
14:54:34 17 it was plugged?

14:54:35 18 A. Correct.

14:54:35 19 Q. What did that lead you to believe?

14:54:38 20 A. That there was no water that could go through  
14:54:41 21 that pipe because it was full of dirt, so there's no way  
14:54:44 22 that water could get through.

14:54:45 23 Q. What did you believe the condition of the pipe  
14:54:49 24 and manhole system -- if I can use that word -- was  
14:54:54 25 based on what you saw in the manhole and what you saw in

14:54:57 1 the pipe?

14:54:58 2 A. Well, with the manhole being in bad condition,  
14:55:01 3 dilapidated when it was found, and then all the dirt in  
14:55:05 4 the pipe, it was an abandoned system. It was old, and a  
14:55:09 5 lot of times when they abandon things, they just leave  
14:55:12 6 them in the ground. They don't always remove them.

14:55:14 7 Q. Is it uncommon to encounter on a construction  
14:55:18 8 project things that are, in fact, obsolete, no longer in  
14:55:23 9 use?

14:55:23 10 A. No. We run across it quite frequently.

14:55:27 11 Q. Is that what you assumed that crossover pipe was?

14:55:29 12 A. Yes.

14:55:30 13 Q. Now, if you assume that if the crossover pipe was  
14:55:37 14 clean, not plugged, that it might be able to serve some  
14:55:42 15 function, could it be replaced?

14:55:44 16 A. Yes, it could.

14:55:45 17 Q. And how would one replace it?

14:55:47 18 A. Put a new pipe in.

14:55:50 19 MR. ROBON: Your Honor, may I approach the  
14:55:51 20 bench?

14:55:53 21 THE COURT: Yes.

14:55:56 22 (Discussion had off the record.)

14:57:08 23 BY MR. BAHRET:

14:57:09 24 Q. Could it be replaced?

14:57:10 25 A. Yes.

14:57:10 1 Q. Could you tell us how?

14:57:12 2 A. We could put a new pipe across there from the --

14:57:16 3 MR. ROBON: Your Honor, can I just show an  
14:57:18 4 objection to this line of questioning?

14:57:20 5 THE COURT: Yes.

14:57:20 6 MR. ROBON: Thank you.

14:57:22 7 THE COURT: The objection is overruled.

14:57:25 8 A. -- from the manhole over to the ditch.

14:57:27 9 Q. Would a pipe fit, in view of the water main in  
14:57:31 10 position?

14:57:32 11 A. Yes, you could fit it in there.

14:57:34 12 Q. How were you able to determine that?

14:57:36 13 A. When you're installing a pipe, the contractor  
14:57:43 14 takes elevation shots of the bottom of the pipe when  
14:57:47 15 they're installing it so they know where it is going.  
14:57:51 16 We -- at the end of the project you have as-built plans,  
14:57:54 17 which are drawings that show where the pipe has been  
14:57:56 18 installed. So we know where that pipe is located, what  
14:58:02 19 the elevation is. And from that drawing that you have  
14:58:07 20 seen earlier that the survey crew took, that gave me an  
14:58:12 21 elevation of where that existing 24-inch is also.

14:58:23 22 Q. Okay. Where would that information B? Is it  
14:58:28 23 visible? Do I have the right spot?

14:58:30 24 A. It's actually written on here, right there. That  
14:58:35 25 613.06 is the top of the waterline pipe that was

14:58:39 1 installed. And then you have right here they're  
14:58:48 2 showing the rim elevation of 618.99. Then right here  
14:58:54 3 is that 24-inch pipe that went across. And if you  
14:59:00 4 subtract the 618.99, 6.6, you get the 612.39, which was  
14:59:08 5 the bottom of that 24-inch pipe.

14:59:12 6 Q. Okay. Give it to us in English.

14:59:15 7 A. Okay. So that means that the bottom of the  
14:59:23 8 24-inch pipe, the waterline just clipped the bottom of  
14:59:30 9 it by about eight inches. So the 24-inch pipe isn't  
14:59:36 10 here, and the waterline didn't go right through center  
14:59:40 11 of it. It clipped the bottom of the pipe, the bottom  
14:59:44 12 eight inches. So you could put in a 12 inch pipe and  
14:59:48 13 easily get it across that waterline pipe.

14:59:51 14 Q. Would a 12 inch clean pipe be more efficient than  
14:59:55 15 a 24-inch plugged pipe?

14:59:58 16 A. Oh, yeah.

15:00:01 17 Q. What would the approximate cost be to do that?

15:00:06 18 MR. ROBON: Objection.

15:00:07 19 THE COURT: Overruled. She may answer.

15:00:08 20 A. It would be \$10,000.

15:00:14 21 Q. Now, that crossover pipe is owned by the  
15:00:17 22 railroad, correct?

15:00:17 23 A. That is correct.

15:00:18 24 Q. Have they ever asked for that to be replaced?

15:00:21 25 A. No, they have not.

15:00:22 1 Q. Did the railroad object when the decision was  
15:00:26 2 made to cut that pipe?

15:00:27 3 A. No, they did not.

15:00:29 4 Q. Was the railroad in consultation? They had a  
15:00:34 5 representative?

15:00:35 6 A. Yes, they had an inspector.

15:00:39 7 Q. Did the railroad representative indicate that  
15:00:41 8 that served any purpose for Cambridge or any of the  
15:00:44 9 private owners?

15:00:47 10 A. Not to my knowledge.

15:00:49 11 Q. Not to you anyway?

15:00:50 12 A. Not to me, no.

15:00:55 13 Q. On the plans Mr. Robon asked more than one  
15:00:59 14 person, including I think you, whether Cambridge showed  
15:01:03 15 up on these construction drawings. Well, I guess the  
15:01:07 16 construction drawings are over there. But the drawings  
15:01:10 17 from Arcadis are a very thick set?

15:01:13 18 A. Yes.

15:01:13 19 Q. And Cambridge, we've acknowledged, doesn't show  
15:01:16 20 up on those drawings. Is that unusual?

15:01:19 21 A. No.

15:01:19 22 Q. Are there other subdivisions and businesses and  
15:01:23 23 establishments that don't show up on the construction  
15:01:26 24 drawings for a waterline?

15:01:28 25 A. Yes.

15:01:28 1 Q. And why is that? What's the purpose of the  
15:01:31 2 construction drawing for a waterline?

15:01:33 3 A. The construction drawings show your limits where  
15:01:37 4 you're working, where you're installing the waterline.  
15:01:41 5 So we don't show what's outside of those limits that you  
15:01:45 6 are going to be working in.

15:01:52 7 Q. There was some discussion about this being a  
15:01:56 8 relatively tight work area. In fact, there was  
15:01:59 9 discussion about filling the ditch as the crews were  
15:02:02 10 going by and then digging the ditch out; do you remember  
15:02:05 11 that?

15:02:05 12 A. Yes.

15:02:06 13 Q. Did Ric-man need the room that it was allotted in  
15:02:10 14 the area behind Cambridge to safely do this pipeline  
15:02:15 15 job?

15:02:16 16 MR. ROBON: Objection.

15:02:24 17 THE COURT: Overruled. She may answer.

15:02:26 18 A. Yes, they did need that room.

15:02:30 19 Q. Did you see any evidence ever, Christy, that  
15:02:33 20 Ric-man overstepped the lines that they were allotted  
15:02:37 21 for their construction project?

15:02:39 22 A. No, I did not.

15:02:42 23 Q. There was some discussion that you supposedly  
15:02:46 24 were rebuffing every effort from Mr. McCarthy. Do you  
15:02:50 25 remember that? Mr. Robon asked you several questions

15:02:54 1 about that. Do you recall?

15:02:55 2 A. Not exactly.

15:02:58 3 Q. Did you try to work with them in any way?

15:03:01 4 A. Yes, I did.

15:03:02 5 Q. We're not allowed to talk about any negotiations,

15:03:05 6 but were -- this is a yes or no answer. Were

15:03:09 7 accommodation offered?

15:03:11 8 A. Yes, they were.

15:03:12 9 MR. ROBON: Objection.

15:03:22 10 MR. BAHRET: I'm not going to ask what.

15:03:25 11 THE COURT: I know. I'm going to sustain

15:03:27 12 the objection and ask the jury to disregard the question

15:03:30 13 and answer unless you can show me at a sidebar the

15:03:33 14 relevance.

15:03:35 15 BY MR. BAHRET:

15:03:36 16 Q. Christy, who is Craig Schaar?

15:03:38 17 A. He is a forestry inspector with the City of  
15:03:41 18 Toledo.

15:03:41 19 Q. Did you consult with Mr. Schaar at any point  
15:03:44 20 about pricing on trees and vegetation?

15:03:46 21 A. Yes, I have.

15:03:48 22 Q. And even -- I guess I can't say that.

15:03:54 23 Mr. Schaar, you know, is occupied with his  
15:04:00 24 mother's illness in Cincinnati?

15:04:01 25 A. That is correct.

15:04:02 1 Q. Counsel has been informed and has kindly allowed  
15:04:05 2 you to give some of the information. You asked for  
15:04:08 3 some estimates for trees and so forth?

15:04:12 4 A. Yes, I did.

15:04:13 5 Q. Could you tell us what information you were  
15:04:16 6 supplied?

15:04:17 7 A. Yes. Craig and I actually went out to the site  
15:04:22 8 together so I could show him the area and make sure he  
15:04:25 9 understood. And then he went back and prepared an  
15:04:29 10 estimate to replace trees and brush in the area. And  
15:04:39 11 he had a proposal to actually plant almost 200 shrubs  
15:04:44 12 along the 500-foot distance in three different rows,  
15:04:52 13 then also he put in nine trees to plant also. And then  
15:04:57 14 he stated that soil would need to be brought in and  
15:05:02 15 fertilizer for these trees and shrubs. And he gave me  
15:05:06 16 a price of over \$22,000 to do that.

15:05:11 17 Q. \$22,400?

15:05:13 18 A. Yes, \$22,497.

15:05:21 19 Q. Let me get back to a different topic. Do you  
15:05:27 20 believe, Christy, that cutting that crossover pipe has  
15:05:31 21 anything to do with the ponding issue on the back of  
15:05:34 22 Cambridge or the neighboring property?

15:05:36 23 A. I do not believe that, no.

15:05:42 24 Q. Do you believe that the piping system maintained  
15:05:45 25 by the railroad had any way of getting the water off



15:05:49 1 that property?

15:05:50 2 A. No, I do not believe so. It wouldn't go through  
15:05:55 3 that dirt.

15:05:58 4 MR. BAHRET: Thank you very much.

15:05:59 5 THE COURT: You may inquire.

15:06:00 6 MR. ROBON: Thank you, Your Honor.

15:06:02 7 - - -

15:06:02 8 CHRISTY SONCRANT, CROSS-EXAMINATION

15:06:03 9 BY MR. ROBON:

15:06:03 10 Q. My understanding, Ms. Soncrant, is that Mr.  
15:06:10 11 McCarthy brought to your attention the condition of the  
15:06:14 12 manhole, and he told you that there was a pipe that ran  
15:06:18 13 underneath the abandoned railroad where the waterline  
15:06:23 14 was going to go, correct?

15:06:24 15 A. I believe so, yes.

15:06:26 16 Q. And then you had a meeting with Mr. Huber and Mr.  
15:06:29 17 McCarthy and a number of others, correct?

15:06:32 18 A. Yes.

15:06:32 19 Q. Then Mr. Huber gave you the railroad plans  
15:06:36 20 showing this manhole and the crossover pipe, correct?

15:06:42 21 A. He gave me the plans that showed the crossover  
15:06:44 22 pipe, yes.

15:06:45 23 Q. It's been alleged here that nobody knew which way  
15:06:51 24 the water went under the pipe, correct?

15:06:54 25 A. That's correct.

15:06:57 1 Q. If you look at the plans that Mr. Huber gave you  
15:07:02 2 from the railroad when they put this in 60 or 70 years  
15:07:07 3 ago, does it show an outlet from the manhole, so if the  
15:07:15 4 water came into the manhole in this 24-inch pipe it  
15:07:18 5 would go someplace, or did no one think about if it goes  
15:07:23 6 in there, it has to go out someplace? Did you ever  
15:07:27 7 think about that?

15:07:28 8 MR. BAHRET: Objection. He's got about four  
15:07:30 9 parts to that question.

15:07:31 10 MR. ROBON: I'll rephrase it.

15:07:32 11 THE COURT: Thank you.

15:07:32 12 BY MR. ROBON:

15:07:34 13 Q. I don't want to confuse you. My question is:  
15:07:36 14 You did get the railroad plans?

15:07:38 15 A. Yes.

15:07:39 16 Q. And did you get them before the survey was done?

15:07:43 17 A. Yes.

15:07:46 18 Q. Did you look at the plans?

15:07:47 19 A. Yes.

15:07:47 20 Q. Did anybody else in the City look at them?

15:07:50 21 A. Joe might have.

15:07:53 22 Q. Joe Crandall?

15:07:54 23 A. Yes.

15:07:55 24 Q. Did you think about if the water came into the  
15:07:57 25 pipe from the railroad ditch, it would have to go

15:08:03 1 someplace, or did that not enter your mind?

15:08:07 2 A. That's true. At one time it would have had go  
15:08:10 3 someplace.

15:08:10 4 Q. And was there anything on the railroad plans that  
15:08:15 5 show that it exited someplace into River Road or Bates  
15:08:23 6 Road or into a creek or a ditch?

15:08:25 7 A. The plans didn't even show the manhole. It just  
15:08:28 8 showed a dash line and 24-inch. So it didn't show an  
15:08:32 9 entry or exit.

15:08:34 10 Q. Did you think it was important to try to figure  
15:08:38 11 out if the water got into the manhole, where it went?

15:08:44 12 A. We believe that that was, like I said, an  
15:08:49 13 abandoned pipe. And it was old, and if it would have  
15:08:56 14 flowed in the past, it left the railroad. So no.

15:09:02 15 Q. If the system was abandoned, as you people seem  
15:09:07 16 to indicate you thought it was, what was there to  
15:09:10 17 replace it? It was obviously put in for a purpose?

15:09:16 18 MR. BAHRET: Objection.

15:09:17 19 THE COURT: Overruled. She may answer.

15:09:19 20 A. When you abandon things, it could be because  
15:09:22 21 they're not needed anymore. It doesn't mean that  
15:09:24 22 there's something right next to it.

15:09:26 23 Q. Did you think about inquiring of the people who  
15:09:30 24 lived in the area like Mr. Sumner who lives on Bates  
15:09:37 25 Road who said their septic tanks even drained into this

15:09:41 1 manhole? Did anybody from the City ask any of the  
15:09:44 2 residents there on Bates Road?

15:09:47 3 A. No, we did not.

15:09:48 4 Q. Did you even think about it?

15:09:49 5 A. No.

15:10:06 6 Q. My understanding is the decision to sever the  
15:10:08 7 pipe was made at that meeting where everybody got  
15:10:13 8 together, right?

15:10:15 9 A. The decision at that meeting was that the pipe  
15:10:20 10 was full of dirt and that if it would have worked in the  
15:10:27 11 past, it would have flown the other way. So yes, we  
15:10:31 12 figured that it was abandoned.

15:10:34 13 Q. So you made the decision before you unearthed the  
15:10:37 14 pipe to sever it, correct?

15:10:40 15 A. That's correct.

15:10:43 16 Q. So how could you suppose that the pipe would be  
15:10:48 17 clogged with twigs, dirt, or mud, because you made the  
15:10:53 18 decision to cut it anyway, didn't you?

15:10:56 19 A. If when we actually would have gone through there  
15:10:59 20 and it would have been open, and we would have felt that  
15:11:03 21 it would have served some purpose, then we would have  
15:11:06 22 been -- we would have put something back in there. But  
15:11:09 23 when we went through and it was full of dirt, it was  
15:11:13 24 like we had all thought it would be, so we did not put  
15:11:17 25 anything back.

15:11:18 1 Q. Well, you testified that you didn't even see the  
15:11:21 2 pipe.

15:11:21 3 A. No, I did not.

15:11:23 4 Q. Mr. Crandall testified that they had already laid  
15:11:27 5 the big pipe, the 66-inch big tile already past the  
15:11:37 6 opening by the time he got there?

15:11:39 7 A. Yes.

15:11:39 8 Q. So the decision was made, and it was fete de  
15:11:47 9 complete?

15:11:47 10 A. That's because when they got there, it was full  
15:11:50 11 of dirt. The contractor could communicate with Joe by  
15:11:57 12 radio.

15:11:57 13 Q. Did you see the pipe, the part that was dug out?

15:12:01 14 A. No, I did not.

15:12:02 15 Q. You never saw it yourself?

15:12:04 16 A. No, I did not.

15:12:05 17 Q. Did you think about having photographs taken of  
15:12:08 18 it knowing that the neighbors, Mr. McCarthy in  
15:12:12 19 particular, were very concerned about it?

15:12:15 20 A. No.

15:12:17 21 Q. So you never saw it?

15:12:18 22 A. No.

15:12:19 23 Q. The only one from the City that saw it is Mr.  
15:12:21 24 Crandall?

15:12:22 25 A. That's correct.

15:12:24 1 Q. Did Mr. Crandall ever tell you that he had a  
15:12:26 2 probe, which is several feet long with a handle on it  
15:12:29 3 that you can stick in the ground and find tiles and  
15:12:32 4 other, you know, monuments?

15:12:35 5 A. Most of our inspectors carry them.

15:12:53 6 Q. And you agree that you did not replace a 24-inch  
15:12:56 7 pipe?

15:12:57 8 A. Yes, I agree.

15:12:58 9 Q. Because the big pipe's in the way?

15:13:02 10 A. Yes, eight inches of it is in the way.

15:13:05 11 Q. And you would agree that Old Granite, Limited  
15:13:15 12 could not replace that pipe because it's on the property  
15:13:21 13 of the railroad, and also because the City of Toledo has  
15:13:25 14 an easement?

15:13:26 15 A. They'd have to get permission to do it.

15:13:29 16 Q. And, in fact, I have been told that it would be  
15:13:34 17 very dangerous because --

15:13:35 18 MR. BAHRET: Objection.

15:13:37 19 THE COURT: Sustained.

15:13:41 20 Q. Tell me if I'm correct. I have been told that a  
15:13:44 21 66-inch water main is under pressure?

15:13:47 22 A. That's correct.

15:13:48 23 Q. And that if the top of the water main didn't have  
15:13:53 24 at least five or six feet of earth on top of it, it  
15:13:57 25 would pop right out of the ground?

15:13:59 1 A. No.

15:14:00 2 Q. That's not true?

15:14:01 3 A. That's not true.

15:14:03 4 Q. How many feet does it have to have?

15:14:06 5 A. You have -- if you would dig over to put in a new  
15:14:10 6 pipe, the pipe -- say you're putting --

15:14:13 7 Q. I'm not asking you about digging for the new  
15:14:15 8 pipe. I'm just talking generally. How many feet do  
15:14:18 9 you have to have to keep the thing in the ground?

15:14:21 10 A. To keep it in the ground?

15:14:22 11 Q. Yeah, so it doesn't pop up out of the ground?

15:14:26 12 A. It can be less than five feet, but without doing  
15:14:29 13 the actual calculation, I don't know, depending on the  
15:14:32 14 soil type and the restraint you put on the pipe.  
15:14:34 15 That's how you determine how you're going to restrain  
15:14:36 16 the pipe is how much soil is there over a whole length.  
15:14:39 17 You can dig up a little area. We do it quite often.  
15:14:43 18 Now, maybe if you had 1,000 feet hanging in the air,  
15:14:47 19 that would be different.

15:15:01 20 Q. And you would agree with me that eventually Mr.  
15:15:07 21 Huber told you the water ran the other way; did he not?

15:15:11 22 MR. BAHRET: Objection. That's not her  
15:15:12 23 testimony, and it wasn't his either.

15:15:14 24 Q. I'm asking.

15:15:15 25 A. No, never told me that.

15:15:20 1 THE COURT: Overruled. She's answered.

15:15:23 2 It may stand.

15:15:25 3 Q. Did you hear his testimony here?

15:15:27 4 A. Yes, I did.

15:15:28 5 Q. He said later he told you?

15:15:30 6 MR. BAHRET: Objection. He did not. He  
15:15:32 7 said he never told her because it was too long after the  
15:15:34 8 fact.

15:15:37 9 THE COURT: Although I let you two fence a  
15:15:39 10 bit, I'm going to indicate it was my recollection as  
15:15:43 11 well that he did not say that.

15:15:45 12 MR. ROBON: I may be getting confused with  
15:15:47 13 his deposition, Your Honor.

15:15:48 14 MR. BAHRET: I object to that. He did not.

15:15:51 15 THE COURT: I understand.

15:15:52 16 Mr. Bahret, stand down. The jury will be  
15:15:54 17 instructed to disregard the comment of counsel.

15:15:59 18 BY MR. ROBON:

15:16:00 19 Q. Did you ever talk to Mr. Huber again about  
15:16:05 20 anything after that meeting at the site?

15:16:09 21 A. I don't think I did, no.

15:16:26 22 Q. And you don't believe that even if you put or  
15:16:31 23 somebody put a pipe from that manhole into the railroad  
15:16:36 24 ditch it would solve the flooding problem that is  
15:16:38 25 occurring at the rear of the Cambridge Subdivision lots,



15:16:43 1 correct?

15:16:43 2 A. That's correct.

15:16:45 3 Q. And can you tell the jury, did you do a study or  
15:16:49 4 engage an outside engineering firm to do a study to see  
15:16:53 5 if that is true or false?

15:16:56 6 A. No, I did not engage a firm to do a study.

15:16:59 7 Q. Did you do an engineering study?

15:17:01 8 A. No, I did not.

15:17:09 9 Q. What do you think is causing the ponding on lots  
15:17:13 10 15 and 16?

15:17:15 11 A. I can't answer that. I don't know.

15:17:18 12 Q. You don't know?

15:17:19 13 A. I'd be guessing.

15:17:25 14 Q. Could you come over --

15:17:28 15 A. Sure.

15:17:29 16 Q. -- please?

15:17:50 17 Did you know or did you ever see the entry of  
15:17:53 18 this drain tile here in the railroad swale -- have you  
15:17:59 19 ever seen that?

15:17:59 20 A. I haven't seen it in the field, no.

15:18:03 21 Q. Have any of the engineers of the City of Toledo  
15:18:07 22 ever bothered to go look and see this beginning of this  
15:18:12 23 drain tile?

15:18:13 24 A. No.

15:18:15 25 Q. On the railroad right-of-way?

15:18:16 1 A. No.

15:18:16 2 Q. Have you ever seen the entry of this -- the  
15:18:20 3 drainage tile on the railroad?

15:18:22 4 A. No.

15:18:26 5 Q. Doesn't it make sense to you that if Mr. McCarthy  
15:18:29 6 put a T in here that the water that's coming down here  
15:18:35 7 or into this tile and the water that's coming here that  
15:18:38 8 should go to this manhole, it can't go out here, it's  
15:18:43 9 either going to come out here, here, or where it was  
15:18:48 10 tapped, right?

15:18:49 11 A. That makes sense.

15:19:12 12 Q. Thank you. Do you own a home?

15:19:14 13 A. Yes, I do.

15:19:14 14 Q. Do you have gutters?

15:19:16 15 A. Yes, I do.

15:19:19 16 Q. Do you have trees in your yard?

15:19:21 17 A. Yes.

15:19:22 18 Q. Do you get leaves in your gutter?

15:19:24 19 A. Yes.

15:19:28 20 Q. If the leaves plug the gutter -- has that ever  
15:19:34 21 happened to you?

15:19:34 22 A. My husband's pretty good about cleaning the  
15:19:37 23 gutters. I have a good husband.

15:19:42 24 THE COURT: Don't tell my wife.

15:19:47 25 Q. If the leaves plug the gutter, and just a little

15:19:52 1 bit of water trickled into the down spout, that doesn't  
15:19:56 2 mean that the gutter has been abandoned or useless, does  
15:20:01 3 it?

15:20:01 4 A. No.

15:20:02 5 Q. We could use that analogy here on this drain  
15:20:06 6 tile, correct?

15:20:06 7 A. I don't feel that it's the same analogy.

15:20:10 8 Q. And you haven't done a study of the drainage  
15:20:17 9 around this manhole or behind the Cambridge Subdivision  
15:20:21 10 to come to any conclusion what is causing the water  
15:20:25 11 problem?

15:20:25 12 A. No.

15:20:26 13 Q. And your opinion is that even if that pipe was  
15:20:29 14 put across into the railroad ditch, it would not solve  
15:20:32 15 the problem, correct?

15:20:34 16 A. Correct.

15:20:36 17 MR. ROBON: No more questions.

15:20:38 18 - - -

15:20:38 19 CHRISTY SONCRANT, REDIRECT EXAMINATION

15:20:39 20 BY MR. BAHRET:

15:20:39 21 Q. Just briefly. Christy, to take Mr. Robon's  
15:20:46 22 analogy one step further, this pipe is under an  
15:20:52 23 abandoned, not an active, railroad, correct?

15:20:55 24 A. Correct.

15:20:56 25 Q. So it's in an area that is no longer in use?

15:21:00 1 A. That's correct.

15:21:01 2 Q. Now, if we use Mr. Robon's analogy, and I ask you  
15:21:05 3 if your downspout was abandoned, if your house had been  
15:21:09 4 vacant and dilapidated for about 60 years, would you  
15:21:12 5 think the downspout was also abandoned then?

15:21:16 6 A. Yes, I would.

15:21:18 7 Q. I thought so. Thank you.

15:21:21 8 THE COURT: Anything further?

15:21:32 9 - - -

15:21:32 10 CHRISTY SONCRANT, RECROSS-EXAMINATION

15:21:33 11 BY MR. ROBON:

15:21:33 12 Q. Christy, did you tell the jury the fact that the  
15:21:36 13 tracks were torn up on the railroad, that doesn't  
15:21:38 14 prevent the rain water from still hitting the ground,  
15:21:41 15 does it?

15:21:41 16 A. No.

15:21:42 17 Q. So even though the track may have been abandoned,  
15:21:46 18 the property was not abandoned, correct?

15:21:49 19 A. That's correct.

15:21:54 20 THE COURT: You may step down.

15:22:04 21 Subject to admission of exhibits, does the  
15:22:07 22 defendant rest?

15:22:08 23 MR. BAHRET: Yes, Your Honor.

15:22:09 24 THE COURT: Any rebuttal by plaintiff?

15:22:10 25 MR. ROBON: No, Your Honor.

15:22:14 1 THE COURT: Okay. Ladies and gentlemen, we  
15:22:17 2 are at a point where I'm going to send you home a little  
15:22:20 3 early today. And I'm going to keep the lawyers here  
15:22:23 4 for a while so when we start tomorrow morning, we'll run  
15:22:27 5 smoothly. We have some homework to do for the next  
15:22:29 6 phase, which is the final instruction, the closing  
15:22:32 7 arguments, and your deliberations.

15:22:37 8 Again, my cautionary instruction to you when  
15:22:40 9 you go home tonight, as always, please remember the  
15:22:43 10 rules. I know that you've heard all the evidence now,  
15:22:46 11 and there may be a temptation to discuss the case, but  
15:22:49 12 you've not heard the final instruction; you've not heard  
15:22:52 13 the closing argument. So you do not have all the  
15:22:54 14 information you need; therefore, I ask you to please  
15:22:57 15 hold off one more day until tomorrow before discussing  
15:23:00 16 the case with your fellow jurors.

15:23:02 17 What time would you like to start tomorrow  
15:23:05 18 morning, now that we have a little clearer schedule and  
15:23:08 19 know that not all the names on the witness list I was  
15:23:12 20 given at the beginning are being called, and we know  
15:23:14 21 we're going to safely get in before the weekend, you may  
15:23:18 22 start a little later if you like.

15:23:24 23 THE JUROR: 8:00.

15:23:25 24 THE COURT: They're ready for an 8:00 start.  
15:23:32 25 Some of our people may have a problem with

15:23:34 1 child care and delivering children to school, so let me  
15:23:38 2 ask if that's okay with counsel if we start at 8:00  
15:23:41 3 tomorrow.

15:23:42 4 MR. BAHRET: My wife will get them on the  
15:23:44 5 bus. I have no problem.

15:23:46 6 THE COURT: 8:00 a.m. tomorrow. Counsel,  
15:23:48 7 you should plan to be here ahead of time so we can  
15:23:51 8 actually and promptly start at 8:00 a.m. Let me ask  
15:23:59 9 our court reporter, is 8:00 a.m. okay?

15:23:59 10 THE COURT REPORTER: Yes.

15:24:01 11 THE COURT: Counsel, take a short break, then  
15:24:03 12 I'll see you in chambers.

15:25:56 13 (The jury exits the courtroom.)

15:38:14 14 MR. DAVIS: Plaintiff's 117, 119, and 120, no  
15:38:21 15 objection.

15:38:51 16 Defendant's object to Plaintiff's 88 and 89,  
15:39:54 17 which are the complaints for foreclosure.

15:39:57 18 Did you have an objection to the CD?

15:40:46 19 MR. BAHRET: No.

15:40:47 20 MR. DAVIS: Do you want to call it 121?

15:41:04 21 MR. BAHRET: Your Honor, we'll give you two  
15:41:06 22 CDs. Theirs is 121. That was the water flow pictures.

15:41:11 23 MR. ROBON: This has that on there. So if  
15:41:13 24 you want to save your --

15:41:14 25 THE COURT: Why don't we go off the record

15:41:16 1 for a moment.

15:41:59 2 (Discussion had off the record.)

15:41:59 3 MR. BAHRET: The disk that is marked as  
15:42:03 4 Plaintiff's Exhibit 121 is a CD that contains the  
15:42:06 5 footage of two short videos they showed with the  
15:42:09 6 drainage, and it also has the entirety of the  
15:42:12 7 preconstruction video, a portion of which the defense  
15:42:17 8 played. And I believe that we played from about  
15:42:22 9 station 175 to 189 or so, in that neighborhood. We  
15:42:29 10 didn't play the whole thing, but I don't think it  
15:42:32 11 matters. We'll give you that disk for posterity.

15:42:37 12 THE COURT: You're going to hold on to all  
15:42:40 13 of them until they go to the jury. Somebody has to keep  
15:42:49 14 that because it's part of the case.

15:42:53 15 THE CLERK: We return the exhibits  
15:42:55 16 immediately to counsel after trial.

15:43:02 17 MR. ROBON: What if there's an appeal?

15:43:04 18 THE COURT: You two need to decide a  
15:43:06 19 repository for that.

15:43:07 20 MR. BAHRET: Even if there's an appeal, the  
15:43:10 21 documents are gone?

15:43:11 22 THE COURT: No, you hold on to them  
15:43:13 23 throughout the pendency of the appeal time.

15:43:15 24 MR. ROBON: So we have to send them down to  
15:43:17 25 the appellate court?

15:43:19 1 THE COURT: You've got it.

15:43:26 2 MR. BAHRET: This doesn't have to be on the  
15:43:27 3 record.

15:44:04 4 (Discussion had off the record.)

15:44:04 5 MR. BAHRET: For us, in no particular order.

15:44:08 6 THE COURT: Before we do that, you have all  
15:44:10 7 agreed on Plaintiff's Exhibits except for these four?

15:44:13 8 MR. BAHRET: Correct.

15:44:14 9 THE COURT: Let me finish that before we go  
15:44:16 10 to the Defendant's.

15:44:18 11 Plaintiff's Exhibit 83 there's an objection.  
15:44:22 12 The grounds?

15:44:23 13 MR. BAHRET: I don't believe those are  
15:44:24 14 damages attributable. It's not a proper element of  
15:44:27 15 damages attributable in a trespass case.

15:44:31 16 THE COURT: What's the relevance of Exhibit  
15:44:33 17 83?

15:44:34 18 MR. ROBON: The relevance, Your Honor, is  
15:44:35 19 how much it cost us to construct the subdivision and the  
15:44:41 20 current value and how much it's been diminished in value  
15:44:44 21 by virtue of the actions of the Defendant.

15:44:48 22 MR. BAHRET: That doesn't show the current  
15:44:49 23 value or how much it's been diminished in value.

15:44:53 24 THE COURT: It certainly doesn't show any  
15:44:56 25 diminishment.



15:44:58 1 MR. ROBON: It shows what our original costs  
15:45:00 2 are.

15:45:00 3 THE COURT: There's been testimony to that.  
15:45:02 4 I'm going to grant the objection and exclude Exhibit 83.  
15:45:06 5 Any possible relevance I think is outweighed by  
15:45:10 6 misleading and confusion for the jury. Frankly, I  
15:45:12 7 would also exclude it on relevancy grounds.

15:45:15 8 84 is a First Federal loan account  
15:45:21 9 statement. Objection because?

15:45:23 10 MR. BAHRET: Same basis. It's irrelevant.  
15:45:26 11 Not a proper measure of damages.

15:45:29 12 THE COURT: We had testimony about it, as I  
15:45:31 13 recall.

15:45:32 14 MR. BAHRET: We did.

15:45:33 15 THE COURT: I'm not sure the document is  
15:45:35 16 appropriate.

15:45:36 17 MR. BAHRET: There was an objection.

15:45:38 18 MR. ROBON: This shows the interest rate is  
15:45:39 19 6.25 percent, and I believe that part of our damage  
15:45:43 20 calculation will be he couldn't have sold it for the  
15:45:47 21 last two years, so 6.25 percent is an article of damages  
15:45:53 22 we can argue to the jury.

15:45:57 23 MR. WATKINS: I thought we had prejudgment  
15:46:00 24 interest issues weren't permissible.

15:46:01 25 MR. ROBON: I don't think that deals with

15:46:03 1 prejudgment. I think that's an issue of damages here,  
15:46:06 2 unless you want -- if you want to stipulate that if we  
15:46:15 3 get an award, we would be entitled to prejudgment  
15:46:19 4 interest, then I wouldn't bring this up.

15:46:21 5 MR. BAHRET: We absolutely will not do that,  
15:46:24 6 which I'm sure doesn't surprise you.

15:46:29 7 MR. WATKINS: You're claiming the interest  
15:46:31 8 as actual damage?

15:46:32 9 MR. ROBON: Uh-huh.

15:46:34 10 MR. WATKINS: We disagree.

15:46:35 11 MR. BAHRET: Absolutely nobody other than  
15:46:37 12 Laskey --

15:46:39 13 THE COURT: Jack testified about that, and  
15:46:40 14 he also testified about the interest rate.

15:46:42 15 MR. BAHRET: He did, but nobody testified  
15:46:45 16 that they can't sell lots because of this. In fact,  
15:46:49 17 their appraiser came out an ascribed value to these  
15:46:52 18 lots.

15:46:54 19 THE COURT: I think to be consistent I'm  
15:46:56 20 going to exclude Exhibit 84 for the same reason I  
15:47:00 21 excluded 83.

15:47:54 22 Next we have Exhibits 88 and 89, each of  
15:47:58 23 which is a complaint, and the relevance of these is --  
15:48:05 24 or the objection to these is?

15:48:07 25 MR. BAHRET: They're irrelevant, especially

15:48:10 1 the foreclosure for the taxes that they stopped paying  
15:48:13 2 three and a half years before any trees were cleared.  
15:48:19 3 It's not a proper element of damage. It's irrelevant.

15:48:22 4 THE COURT: We have the testimony.

15:48:24 5 MR. BAHRET: We do.

15:48:25 6 THE COURT: I'm not sure the exhibit  
15:48:27 7 furthers that testimony in a meaningful way. I'm going  
15:48:31 8 to -- unless you have something for me to grab a hold  
15:48:34 9 of, Marv, I'm going to exclude exhibits --

15:48:39 10 MR. ROBON: As long as I'm not prohibited  
15:48:41 11 from talking about this in final argument.

15:48:43 12 THE COURT: Anything that came in by way of  
15:48:45 13 testimony you can certainly reference, absolutely,  
15:48:48 14 unless I ordered it stricken.

15:48:50 15 Which reminds me, I did a check of Mr.  
15:48:55 16 Huber's trial testimony, and I was correct that his  
15:48:58 17 testimony was that he did not inform Mrs. Soncrant at a  
15:49:06 18 later date. His answer was, quote, "No, I did not. It  
15:49:09 19 was too late," end quote.

15:49:11 20 MR. ROBON: I just remember it different.  
15:49:14 21 I'm sure it was depo because I think he told her a year  
15:49:17 22 later or something.

15:49:19 23 MR. BAHRET: No. Check your transcript.

15:49:21 24 THE COURT: I caution you that was ordered  
15:49:23 25 stricken from the jury, and there should not be comment

15:49:25 1 about that in final argument.

15:49:28 2 MR. BAHRET: Frankly, I thought that was  
15:49:31 3 unfair to mention the depo because he most definitely  
15:49:34 4 did not.

15:49:34 5 MR. ROBON: Can we have a stipulation that  
15:49:36 6 Mr. Bahret will not mention settlement with the  
15:49:39 7 contractor?

15:49:40 8 THE COURT: Absolutely. It's a two-way  
15:49:43 9 street. Shame on both of you.

15:49:46 10 Now defendant's exhibits.

15:49:51 11 MR. BAHRET: They are not objecting to K,  
15:49:54 12 which is the sketch. We've got two series of  
15:50:04 13 photographs, A1 through -12, and what should have been  
15:50:08 14 B1 through -17. We cued this up, and we're going to fix  
15:50:13 15 it. Both sets, the copies we gave the Court and  
15:50:17 16 counsel, they are correctly marked. In the originals  
15:50:21 17 both sets are A. A1 through -17 and A1 through -12.  
15:50:27 18 I'm going to take these home tonight and -- or to the  
15:50:31 19 office and get them relabeled with Bs. They're not  
15:50:35 20 objecting to any of these. I'd ask the Court if either  
15:50:38 21 you or I, to explain to them what may have been  
15:50:41 22 referenced as As, and they may be Bs. All right.

15:50:45 23 THE COURT: That's fine. Remind me  
15:50:46 24 tomorrow, and I'll make a statement to that effect.

15:50:55 25 MR. BAHRET: Exhibit M, which is the plans,

15:50:58 1 they're not objecting to. And I think the others they  
15:51:05 2 are objecting to.

15:51:11 3 THE COURT: Then let's start with the  
15:51:12 4 objected ones. Number?

15:51:16 5 MR. BAHRET: F is the drainage plan.  
15:51:19 6 Marv's objection is -- that's page 9 in Exhibit M.

15:51:24 7 THE COURT: If it's duplication, same ruling  
15:51:26 8 as before, one or the other. If it's in there, in  
15:51:30 9 fact, if it helps you to label that page F or something,  
15:51:35 10 that's in that exhibit, but we're not going to do it  
15:51:38 11 twice.

15:51:39 12 MR. BAHRET: That's acceptable if I can just  
15:51:41 13 put a little label on there that it's -- what did I say  
15:51:45 14 this was?

15:51:46 15 THE COURT: F, as in frank.

15:51:49 16 So Exhibit F, the single page document is  
15:51:52 17 excluded.

15:51:53 18 MR. BAHRET: Okay. And then the documents  
15:51:58 19 down here that were created by -- this first one is O,  
15:52:04 20 created by Babcock.

15:52:09 21 MR. ROBON: We object, Your Honor, on the  
15:52:10 22 basis that he's attempting to portray this document as a  
15:52:14 23 survey, and it does not meet the standards of a survey  
15:52:18 24 in Ohio. It's not sealed. It's not signed. It's  
15:52:23 25 not dated. There is no scale on it. In other words,

15:52:28 1 a survey normally has a scale, one inch equals 30 feet,  
15:52:33 2 or something like that. All it is, it would be like  
15:52:35 3 putting someone's notes into evidence. He testified  
15:52:38 4 about it. But -- and he talks about -- he doesn't talk  
15:52:45 5 about property owner; he talks about plaintiff. And he  
15:52:49 6 talks about a 30-foot Edison easement that I don't  
15:52:54 7 believe is accurate on here. There's been no testimony  
15:52:56 8 that there's a 30-foot Edison easement on our property.

15:53:01 9 MR. BAHRET: It's in Exhibit M.

15:53:04 10 THE COURT: I believe that goes to weight,  
15:53:05 11 not admissibility, so I'll overrule that objection and  
15:53:08 12 admit Exhibit O, as in Oscar.

15:53:19 13 MR. BAHRET: Then we've got C. I think  
15:53:21 14 he's got the same objection on that one.

15:53:23 15 THE COURT: For the same reason I'll admit  
15:53:26 16 Exhibit C, as in cat.

15:53:47 17 Does that cover the objected exhibits?

15:53:49 18 MR. ROBON: Except we would ask the Court to  
15:53:52 19 reconsider Exhibit 93 because this drawing here is no  
15:53:58 20 different than Exhibit C or O that the defendant is  
15:54:02 21 getting into evidence. That's what this is. This is  
15:54:05 22 a picture with drawing on it.

15:54:07 23 THE COURT: I think there is a difference.  
15:54:08 24 As I recall, the witnesses on the defendant's exhibits  
15:54:12 25 testified they were accurate, et cetera. Whereas in

15:54:18 1 this the witness specifically said, as I recall, that  
15:54:23 2 there was not accuracy to it, as in the profession. And  
15:54:31 3 when there was an objection, I sustained it and allowed  
15:54:34 4 you an opportunity to establish a foundation for it, and  
15:54:37 5 that never took place. So I think there is a  
15:54:40 6 difference, a material difference between the two.

15:54:43 7 MR. BAHRET: On this exhibit, Your Honor, if  
15:54:45 8 you recall the witness specifically said he wasn't sure  
15:54:48 9 this was oriented properly, but it was somewhere in that  
15:54:51 10 general range. I'd also point out, to pick up on  
15:54:54 11 Marv's objection earlier, my two exhibits were prepared  
15:54:58 12 by a registered licensed surveyor. This one is not.

15:55:03 13 MR. ROBON: Well, to compromise this, Your  
15:55:06 14 Honor, I would cut right off the bottom here, just have  
15:55:11 15 three-fourths of a sheet where there's no line because  
15:55:14 16 the purpose of the exhibit is to show the tree cutting  
15:55:18 17 up to the railroad.

15:55:18 18 THE COURT: Don't we have that in other  
15:55:21 19 testimony and perhaps even in other photographs?

15:55:24 20 MR. ROBON: Not as good as that one. It  
15:55:27 21 doesn't show the trees as large.

15:55:30 22 MR. WATKINS: It's the one with the red line  
15:55:32 23 in it?

15:55:34 24 MR. ROBON: Yes.

15:55:35 25 THE COURT: What do I tell the jury about

15:55:37 1 why that photo's been lopped?

15:55:39 2 MR. ROBON: They might not even recognize  
15:55:42 3 it.

15:55:42 4 MR. WATKINS: They might.

15:55:43 5 MR. ROBON: It's no different than redacting  
15:55:48 6 something in a written document. Because the City has  
15:55:57 7 contended all along there were no big trees and there  
15:56:00 8 was just brush, brambles. And this evidence disputes  
15:56:04 9 that.

15:56:21 10 THE COURT: Well, if we chop it off there,  
15:56:30 11 what's the objection, so that it reads lot 15, and just  
15:56:38 12 the top half basically of the photograph.

15:56:43 13 MR. BAHRET: I think it's practically  
15:56:45 14 useless but --

15:56:50 15 THE COURT: I'm not sure either then what it  
15:56:52 16 does for the jury because there won't be any explanation  
15:56:54 17 of where it shows on lot 15.

15:57:01 18 MR. ROBON: But what it does, it shows the  
15:57:03 19 size of the trees and stumps.

15:57:06 20 MR. BAHRET: Frankly, I don't think that  
15:57:08 21 exhibit would be proper with the legend on it and the  
15:57:10 22 explanation anyway.

15:57:13 23 THE COURT: We're taking that off. That's  
15:57:15 24 why I'm reexamining it. I guess I will allow it if you  
15:57:19 25 chop it where I'm suggesting so at least the arrow above



15:57:23 1 is on but everything else -- that would be Plaintiff's  
15:57:26 2 93 with that modification will be allowed.

15:57:30 3 MR. ROBON: Do you have a pair of scissors?

15:57:35 4 MR. DAVIS: Safety scissors only.

15:57:38 5 THE COURT: We give them stickers, training  
15:57:44 6 on computers, cookies.

15:58:28 7 Are you ready to have arguments about  
15:58:31 8 motions?

15:59:20 9 THE COURT: The record should reflect that  
15:59:24 10 we have concluded the evidence testimony, the admission  
15:59:31 11 and exclusion of exhibits. Because we took several  
15:59:36 12 matters out of order, we are now going to entertain any  
15:59:40 13 motions as if they were at the conclusion of plaintiff's  
15:59:43 14 case. Any motions by either side?

15:59:48 15 MR. WATKINS: The defense has a motion.

15:59:50 16 THE COURT: Proceed.

15:59:51 17 MR. WATKINS: Thank you. Motion for  
15:59:54 18 directed verdict is what we're asking the Court to enter  
15:59:58 19 upon all claims that have been asserted in this case.  
16:00:02 20 The argument -- I will try to be brief. I just want to  
16:00:05 21 keep it organized and want to mention that of the  
16:00:12 22 greatest significance here that applies to several  
16:00:16 23 different arguments is the quite unusual fact that in  
16:00:20 24 this case, I mean, when you look at other cases that  
16:00:25 25 I've seen that are relevant, it hasn't happened. The

16:00:28 1 plaintiff in this case, Old Granite, has sued the City  
16:00:35 2 of Toledo and no one else on behalf of the City of  
16:00:39 3 Toledo, no employees, and for that reason, based upon  
16:00:44 4 the law, which I provided to counsel in an excerpt -- I  
16:00:51 5 do have the full case here somewhere.

16:00:54 6 THE COURT: Keith, I may save you some time.  
16:00:56 7 You provided the Court with copies of those cases,  
16:00:59 8 correct?

16:01:00 9 MR. WATKINS: Two of them.

16:01:01 10 THE COURT: And I have issued a ruling on  
16:01:03 11 that, and I disagree with your interpretation of those  
16:01:06 12 cases. And so if that is the basis for a motion, and I  
16:01:10 13 don't do this to be mean but rather to save time, unless  
16:01:13 14 there's something new or different, I'm going to be  
16:01:17 15 consistent with the order filed in the case when I  
16:01:20 16 denied your motion in limine on that ground, and I'm  
16:01:23 17 going to deny it again.

16:01:24 18 MR. WATKINS: Okay. I simply want to add a  
16:01:26 19 couple authorities quick for the record here based on  
16:01:30 20 Board of County Commissioners v. Brown from the Supreme  
16:01:33 21 Court of United States, 520 U.S. 397. The argument  
16:01:38 22 that a municipality cannot be held liable solely because  
16:01:42 23 it employs a tortfeasor or, in other words, a  
16:01:45 24 municipality can't be held liable under Section 1983 on  
16:01:50 25 an respondeat superior theory or vicarious liability,

16:02:00 1 anything like that.

16:02:03 2 That argument having been said, I'm not  
16:02:05 3 going to -- there are other authorities that could be  
16:02:08 4 mentioned.

16:02:09 5 I would like to make a preliminary inquiry  
16:02:12 6 before I argue much on the taking issue. We have  
16:02:15 7 received the Court's proposed instructions, and in the  
16:02:21 8 Court's proposed instructions on page 7, positions of  
16:02:25 9 the parties, there is reference to "Plaintiff claims  
16:02:31 10 these actions constitute an unconstitutional taking of  
16:02:36 11 private property for public use." That's on page 7,  
16:02:40 12 positions of the parties. However, further  
16:02:43 13 instructions prepared by the Court starting on page 8  
16:02:46 14 describe Plaintiff's claims in this case as negligence  
16:02:50 15 and trespass. And my inquiry here is as to whether or  
16:02:55 16 not that was simply a misprint or a mistype like our  
16:02:59 17 staff does sometimes, or whether the Court intended to  
16:03:01 18 include and remains pending here the taking clause.

16:03:06 19 THE COURT: The taking claim remains  
16:03:08 20 pending. I'm waiting to see if you will be persuasive  
16:03:11 21 in your argument.

16:03:12 22 MR. WATKINS: Thank you. The taking in the  
16:03:18 23 case from the Sixth Circuit, Cox v. Tennessee Valley  
16:03:23 24 Authority, 19 --

16:03:26 25 THE COURT: I'm familiar with the case.

16:03:28 1 MR. WATKINS: Thank you. The Court ruled  
16:03:33 2 that a temporary condition did not constitute a taking  
16:03:37 3 of property. There is no evidence, I would submit, in  
16:03:40 4 this case on behalf of the plaintiff that there is any  
16:03:43 5 permanent problem whatsoever. There's talk about  
16:03:47 6 vegetation which can be regrown; there is a dispute on  
16:03:52 7 that issue for certain, but there is no testimony that  
16:03:55 8 this is a permanent problem regarding the vegetation.  
16:04:00 9 There is no testimony, I would submit, that there is any  
16:04:04 10 permanent problem regarding drainage. In particular,  
16:04:08 11 this Cox case addressed flooding caused by the Tennessee  
16:04:16 12 Valley authority four times for homeowners, their homes  
16:04:21 13 have been -- their homes have been flooded caused by a  
16:04:23 14 change in the operation of the authorities damn. As a  
16:04:29 15 matter of law it was determined that was not a taking  
16:04:32 16 because it was temporary and did not constitute  
16:04:35 17 permanent taking recoverable under the law. I don't  
16:04:39 18 want -- in that case, though, it wasn't -- as I  
16:04:43 19 mentioned, from the Sixth Circuit, but there are several  
16:04:45 20 authorities cited in it, particularly from the United  
16:04:51 21 States Supreme Court Loretta v. Teleprompter Manhattan,  
16:04:56 22 458 U.S. 419. A temporary invasion is insufficient to  
16:05:02 23 constitute a taking. To create an enforceable  
16:05:07 24 liability against the government it must constitute an  
16:05:09 25 actual permanent invasion of the land.

16:05:14 1 In Cox it didn't happen. We submit it  
16:05:18 2 hasn't happened here. No evidence or basis for a  
16:05:22 3 legitimate argument that there was permanent taking.  
16:05:26 4 That is our argument pertaining to taking.

16:05:30 5 Examples: The valid taking claims of when a  
16:05:34 6 City, without notice, turns your entire backyard into a  
16:05:38 7 street. That's what happened in the Cruz case.

16:05:41 8 When coal companies undermine the stability  
16:05:45 9 of your house, that's a keystone case. The Loretta  
16:05:50 10 case involved the permanent physical occupation takeover  
16:05:54 11 of your property.

16:05:55 12 There's no evidence here at all that the  
16:05:58 13 City of Toledo occupied or took over any of the  
16:06:03 14 plaintiff's property. There's a dispute as to how much  
16:06:06 15 in this temporary scenario was invaded. Temporary  
16:06:12 16 flooding is not a taking under the Cox scenario. Even  
16:06:16 17 under their proposals and their argument, it can be  
16:06:19 18 fixed. It's just one of the things they ask for  
16:06:23 19 damages here, which may be or may not be actionable  
16:06:27 20 under a different theory. But taking, we submit, is  
16:06:30 21 not appropriate.

16:06:31 22 That argument having been made, one of the  
16:06:34 23 other arguments I would like to clarify here in terms of  
16:06:38 24 whether or not it's necessary in the proposed  
16:06:40 25 instructions I have seen from the Court, I see no

16:06:43 1 reference whatever to 42 U.S.C. Section 1983 or  
16:06:48 2 constitutional claims. I will rely upon the arguments  
16:06:53 3 we have already presented of record and perhaps  
16:06:57 4 decisions of the Court that I am overlooking now, which  
16:07:00 5 can happen, but because it is not in the proposed  
16:07:02 6 instructions, I am inquiring whether or not I need to  
16:07:06 7 argue directed verdict on that point. I guess for the  
16:07:08 8 record I will.

16:07:09 9 THE COURT: On which point?

16:07:11 10 MR. WATKINS: 42 U.S.C., 1983 claims and  
16:07:15 11 constitutional federal claims asserted by the plaintiff  
16:07:17 12 in this case.

16:07:18 13 THE COURT: I'm viewing them all together,  
16:07:20 14 the 1983 and the taking constitutional claims, so if you  
16:07:23 15 want to address something different or supplementing  
16:07:26 16 that, go ahead. Just remember, the longer you argue,  
16:07:37 17 the longer you're here on the jury charge conference.

16:07:59 18 Why is that distinction a difference here?  
16:08:02 19 Isn't the 1983 claim, the constitutional claim, aren't  
16:08:07 20 they one and the same?

16:08:08 21 MR. WATKINS: In our view, no. I can  
16:08:10 22 explain why. In the proposed instructions and  
16:08:12 23 authorities we have cited, the standard --

16:08:15 24 THE COURT: Let me stop you. Ethan, are  
16:08:17 25 they the same or are they different?

16:08:20 1 MR. DAVIS: They're the same, Your Honor.  
16:08:24 2 Owensby v. City of Cincinnati, which is not only  
16:08:26 3 directly on point for the 1983 issue, but also on the  
16:08:31 4 municipal liability respondeat superior issue as well.  
16:08:35 5 So it's an interesting case. But it does hold that  
16:08:38 6 municipal liability may be imposed under 42 U.S.C. 1983  
16:08:43 7 for a single decision by municipal policymakers under  
16:08:46 8 appropriate circumstances. And I think the evidence in  
16:08:50 9 this case has been very clear that the decision to sever  
16:08:53 10 the drainage tile especially was a decision made by the  
16:08:56 11 City of Toledo through its authorized group  
16:08:58 12 representatives that collectively made a decision to  
16:09:02 13 sever that tile.

16:09:03 14 THE COURT: I've already indicated that I'm  
16:09:05 15 denying the motion based on a respondeat superior theory  
16:09:12 16 because I believe that that fails for the reasons that  
16:09:14 17 I've already expressed in my written order.

16:09:20 18 So we've now heard argument on the taking  
16:09:22 19 claim from defendant. Let's hear from the plaintiff on  
16:09:24 20 whether you have, under the Cox case or any other  
16:09:28 21 authority, established a prima facie case for taking.

16:09:33 22 MR. DAVIS: While not as significant as the  
16:09:36 23 Cruz case, we think it's on points insofar as the  
16:09:39 24 vegetation's not there anymore, and the water is, so  
16:09:41 25 it's a take because there's been a physical occupation.

16:09:44 1 It's a fixable physical occupation if we can get a  
16:09:48 2 pumping station in there or otherwise divert the water.  
16:09:50 3 But I think the evidence has been there was not  
16:09:53 4 significant flooding on the rear of these lots prior to  
16:09:56 5 the City of Toledo's activities. As a result of what  
16:09:58 6 they did, we now have pretty much permanent standing  
16:10:01 7 water on the rear of these lots whenever it rains.

16:10:04 8 THE COURT: Well, now you exaggerate. I  
16:10:06 9 believe the evidence is, and correct me if I'm wrong,  
16:10:08 10 that there was some water before this work was done and  
16:10:11 11 that there may be some additional water after this work  
16:10:16 12 was done. And further the evidence, I believe, is  
16:10:19 13 undisputed that this, if you want to call it flooding,  
16:10:23 14 frankly I view it as ponding, in the back of the lot of  
16:10:27 15 several lots of the subdivision, not all the lots, has  
16:10:31 16 not interfered with somebody living there and using the  
16:10:36 17 property.

16:10:38 18 Your point has been that it has interfered  
16:10:40 19 with the value of the property, with making the trains  
16:10:46 20 perhaps more visible and more audible. But tell me how  
16:10:49 21 this satisfies the Cox standard cited by the defendant,  
16:10:52 22 the Sixth Circuit authority which has held that the  
16:10:56 23 standard for a taking under our federal constitution  
16:11:00 24 means the land must be subjected to permanent liability;  
16:11:05 25 to permanent, even if intermittent, and frequent



16:11:10 1 flooding?

16:11:14 2 MR. DAVIS: I think that's what the evidence  
16:11:15 3 that has been presented was. And especially when you  
16:11:18 4 consider the jury view, while it's not evidence, it's  
16:11:20 5 significant. We've had no rain -- no significant  
16:11:23 6 rainfall for a period of weeks, and there was standing  
16:11:26 7 water that was visible in the back of lot 16 right there  
16:11:29 8 at the drainage tile when we were out there the other  
16:11:32 9 day.

16:11:32 10 THE COURT: Would you call that -- even if  
16:11:34 11 it were to be considered evidence, which a jury view is  
16:11:37 12 not, would you call that sufficient to constitute a  
16:11:40 13 taking under our federal constitution, what we observed  
16:11:43 14 out there?

16:11:44 15 MR. DAVIS: That, Your Honor, prohibits them  
16:11:46 16 from using that portion of their property for any viable  
16:11:49 17 use whatsoever except for ponding water.

16:11:51 18 THE COURT: Is that not something that can  
16:11:53 19 be corrected? Isn't that what all the evidence here has  
16:11:56 20 talked about is how to correct the problem?

16:11:57 21 MR. DAVIS: It can be corrected, as can the  
16:12:00 22 vegetation, but it takes a significant period of time  
16:12:04 23 and some money to put these plants in, to have them come  
16:12:08 24 back.

16:12:08 25 THE COURT: As a practical matter what does

16:12:11 1 the taking claim provide you that you don't get with the  
16:12:14 2 trespass and the negligence claim?

16:12:16 3 MR. DAVIS: Good question. I think they're  
16:12:18 4 somewhat redundant in that regard. But we're arguing  
16:12:21 5 over what I think is a matter of degree rather than the  
16:12:24 6 take. I mean, if the City of Toledo takes a portion of  
16:12:27 7 my property, even if it's only a couple of feet, they've  
16:12:30 8 still taken a portion of my property, Judge, and it  
16:12:33 9 doesn't matter that it's not as significant as the Cruz  
16:12:36 10 case, but I think applicable law still applies.

16:12:40 11 THE COURT: I'm sorry I interrupted your  
16:12:42 12 argument. If there's something else you want to offer  
16:12:44 13 me, please do. And you can talk about both the water  
16:12:48 14 and the vegetation if you want because they're both  
16:12:52 15 factors under the taking claim.

16:13:06 16 MR. DAVIS: Give me just a moment, Your  
16:13:08 17 Honor, while I look for the one provision that I thought  
16:13:12 18 might be on point.

16:13:13 19 I think there's, even without a taking  
16:13:15 20 claim, there's still a 1983 claim for municipal  
16:13:19 21 liability, which I do think is somewhat separate.

16:13:23 22 THE COURT: You're turning on me now. You  
16:13:25 23 say it's separate. How so?

16:13:28 24 MR. DAVIS: Because the severing of the  
16:13:30 25 drainage tile by a collective City of Toledo decision

16:13:33 1 results in 1983 liability from damage to our property.  
16:13:39 2 So even if there's not a legal take, there can still be  
16:13:43 3 a constitutional challenge based on the severance of the  
16:13:46 4 drainage tile in addition to a taking claim resulting  
16:13:50 5 from the diminution of the use of our property. And  
16:13:54 6 for that I would site the Brick v. City of Cleveland  
16:13:58 7 case from the Eighth District Court of Appeals. I have  
16:14:03 8 copies if you'd like them.

16:14:05 9 THE COURT: Please hand one up. Anything  
16:14:07 10 you're going to rely on in argument would be nice to  
16:14:10 11 have ahead of time or at the time of --

16:14:13 12 MR. DAVIS: I didn't know what the defense  
16:14:14 13 was going to argue that they hadn't already advanced,  
16:14:18 14 Your Honor.

16:14:26 15 Again, when the City of Toledo or any  
16:14:29 16 governmental entity comes on your property and starts  
16:14:31 17 removing trees --

16:14:33 18 THE COURT: Is that a take when you remove  
16:14:34 19 my tree?

16:14:35 20 MR. WATKINS: No. It can be regrown. It  
16:14:39 21 is temporary. There is no evidence of any permanence  
16:14:42 22 at all.

16:14:44 23 MR. DAVIS: I'd like to see a tree stump be  
16:14:47 24 regrown. It can be replaced. If the City bulldozes  
16:14:51 25 my house, it can be replaced, but it can't be regrown,

16:14:55 1 and it is a take.

16:14:58 2 MR. WATKINS: Not under that theory. Not  
16:15:01 3 under take. If he wants to address a Section 1983  
16:15:04 4 liability, which he has done, we would suggest it may be  
16:15:08 5 under that, with a different standard. But taking  
16:15:11 6 requires permanence.

16:15:13 7 THE COURT: What's the standard under 1983?

16:15:16 8 MR. WATKINS: Under 1983 the standard is  
16:15:19 9 under the Owensby v. City of Cincinnati, which we cited  
16:15:23 10 in our proposed jury instructions number 16 and the  
16:15:26 11 trial brief, and other cases, the standard that  
16:15:28 12 plaintiff must demonstrate as to all claims in this case  
16:15:32 13 that the defendant City of Toledo was deliberately  
16:15:37 14 indifferent to plaintiff's rights which caused the  
16:15:40 15 damages of which they complain. That's the law we  
16:15:43 16 submit. It's not a general negligence claims. It's  
16:15:47 17 not -- it's deliberate indifference. They may think  
16:15:52 18 they've got that here on a jury issue. I don't know.  
16:15:55 19 We disagree. We submit directed verdict on those  
16:15:58 20 claims are appropriate also. Is there any evidence  
16:16:01 21 that the City of Toledo was deliberately indifferent to  
16:16:06 22 Cambridge's claims? I think at most what they've got  
16:16:09 23 here is a four-inch mistake or, by their own expert's  
16:16:13 24 testimony, a four- to six-foot mistake; nothing  
16:16:16 25 intentional, nothing deliberately indifferent. That,

16:16:22 1 the defense submits, is the law.

16:16:25 2 Also, one thing I forgot to mention  
16:16:27 3 regarding taking. A loss of view is not actually a  
16:16:33 4 taking. The trees, I guess they're interrelated, the  
16:16:37 5 trees, the water, but our belief, returning to where I  
16:16:42 6 was, the Owensby v. Cincinnati case is not an unusual  
16:16:46 7 case. It's just the one from the Sixth Circuit in  
16:16:51 8 2005, 414 F.3d 596 at pages 602 to '3. Other cases are  
16:17:00 9 cited. Many others could be cited. But that one was  
16:17:04 10 from the Sixth circuit. And there are Supreme Court  
16:17:06 11 cases as well; I just didn't think they were as clear as  
16:17:09 12 this one was. Deliberate indifference, we submit, is  
16:17:13 13 the appropriate standard.

16:17:19 14 MR. DAVIS: Going back to the Cruz case, Your  
16:17:21 15 Honor, citing to Armstrong v. United States, I think  
16:17:25 16 this is an interest citation. When faced with a  
16:17:28 17 constitutional challenge to a permanent physical  
16:17:31 18 occupation of real property, this Court has invariably  
16:17:35 19 found a taking. The modern significance of physical  
16:17:41 20 occupation is that courts never deny compensation for a  
16:17:45 21 physical takeover. The one incontestable case for  
16:17:50 22 compensation seems to occur when the government  
16:17:52 23 deliberately brings it about, that its agents or the  
16:17:56 24 public at large regularly use or permanently occupy a  
16:18:00 25 space or thing which was therefore understood to be

16:18:03 1 under private ownership. Those trees were ours. They  
16:18:07 2 took them.

16:18:08 3 THE COURT: Are they permanently using or  
16:18:11 4 occupying the property in Cambridge?

16:18:13 5 MR. DAVIS: They are permanently using or  
16:18:14 6 occupying the trees they took off our property, and the  
16:18:18 7 flooding is a permanent physical occupation. Again, I  
16:18:21 8 think we're arguing over degree as to whether that  
16:18:24 9 activity constitutes a take or not.

16:18:27 10 MR. WATKINS: Well, the only argument is the  
16:18:29 11 cost of repair here. \$20,000, \$10,000 for the  
16:18:34 12 flooding --

16:18:35 13 MR. DAVIS: \$200,000 for flooding.

16:18:37 14 THE COURT: The drainage, whatever. But  
16:18:38 15 the very idea that it can be repaired disputes the idea  
16:18:41 16 that it's permanent. It can be fixed.

16:18:45 17 MR. DAVIS: You know, I've seen in eminent  
16:18:49 18 domain cases I've seen cost of cure as an element of  
16:18:53 19 damage in a physical take. So under Mr. Watkins'  
16:18:56 20 argument, you'd never have a take when there's an  
16:19:00 21 opportunity to cure it.

16:19:02 22 MR. WATKINS: Well, I cited the cases  
16:19:03 23 where -- several case in which there was not a way to  
16:19:07 24 cure.

16:19:08 25 But anyway, going back to what we were

16:19:15 1 discussing, the Section 1983 federal claims, deliberate  
16:19:20 2 indifference, we submit, is required. I haven't heard  
16:19:23 3 a response to that. Maybe it's there.

16:19:25 4 I also have a few comments about trespass,  
16:19:29 5 which is also in the Court's proposed instruction. But  
16:19:33 6 the deliberate indifference would, in our view, our  
16:19:37 7 humble contention, require a different set of  
16:19:41 8 instructions rather than ordinary negligence.

16:19:50 9 THE COURT: Any other arguments for a  
16:19:52 10 directed verdict at the conclusion of plaintiff's case?

16:19:55 11 MR. WATKINS: Yes. On the trespass issue,  
16:20:00 12 the -- during the cross-examination of Mr. McCarthy  
16:20:09 13 about the dirt and everything like that, Mr. Bahret, in  
16:20:14 14 response to some of the previous questions that had been  
16:20:18 15 argued by counsel, asked him to acknowledge that in  
16:20:22 16 placing that dirt he was on the CSX right-of-way and  
16:20:26 17 trespassed there.

16:20:27 18 THE COURT: So?

16:20:28 19 MR. WATKINS: At that point Mr. Robon got up  
16:20:30 20 and said, and it's on the record: "Objection. Trespass  
16:20:34 21 is an intentional act."

16:20:38 22 THE COURT: So?

16:20:39 23 MR. WATKINS: So there's no evidence in this  
16:20:40 24 case that the City of Toledo intentionally trespassed on  
16:20:45 25 the Cambridge Subdivision property.

16:20:47 1 THE COURT: Isn't there disputed evidence on  
16:20:49 2 whether they crossed the boundary line? And if so, by  
16:20:51 3 how much?

16:20:52 4 MR. WATKINS: There is, but that -- there is  
16:20:54 5 no evidence that they intended to do so. That's our  
16:20:59 6 argument and our position in this case.

16:21:01 7 THE COURT: Response?

16:21:02 8 MR. DAVIS: Your Honor, the City of Toledo by  
16:21:03 9 and through its agents certainly intended to cut to  
16:21:06 10 those boundary lines. And I think that's all that's  
16:21:09 11 necessary to show a trespass.

16:21:11 12 MR. WATKINS: To cut through the boundary  
16:21:13 13 lines?

16:21:14 14 MR. DAVIS: To cut up to the boundary lines.  
16:21:16 15 That was certainly intentional.

16:21:18 16 MR. WATKINS: But not through. There's no  
16:21:20 17 evidence that they --

16:21:20 18 MR. DAVIS: There's certainly evidence they  
16:21:22 19 went six feet over in spots.

16:21:23 20 THE COURT: Any other arguments on directed  
16:21:26 21 verdict at the close of plaintiff's case?

16:21:29 22 MR. WATKINS: I think that's it.

16:21:33 23 THE COURT: I'll take all of those motions  
16:21:36 24 under advisement.

16:21:37 25 We're now at the close of all evidence in



16:21:39 1 this case. Do you wish to renew your motions on the  
16:21:43 2 same grounds?

16:21:44 3 MR. WATKINS: Yes.

16:21:46 4 THE COURT: Any motions from plaintiff?

16:21:51 5 MR. DAVIS: We're open to ideas.

16:21:54 6 THE COURT: That's a no, I take it? That's  
16:21:56 7 a no?

16:21:56 8 MR. DAVIS: That's a no, Your Honor.

16:21:58 9 THE COURT: Thank you. Viewing all the  
16:22:00 10 evidence in this case that has been presented, and  
16:22:05 11 viewing it in a light most favorable to plaintiff, first  
16:22:08 12 I find that there has not been sufficient evidence for a  
16:22:13 13 1983 claim to go to the jury.

16:22:22 14 I also find there is not sufficient evidence  
16:22:25 15 for a taking claim to go to the jury. And I will  
16:22:28 16 explain that as follows: The Sixth Circuit provides a  
16:22:32 17 standard for a taking under the federal constitution for  
16:22:34 18 flooding, and it is that a landowner must show either  
16:22:39 19 that the government has effectively destroyed the land,  
16:22:42 20 and I don't think anyone's claiming here the land has  
16:22:44 21 been effectively destroyed, or that the government has  
16:22:48 22 subjected the land to a permanent liability. And it  
16:22:52 23 could be an intermittent liability, but it must be  
16:22:55 24 permanent and frequent. And the Cox case cited by the  
16:22:59 25 defendant specifically dealt with frequent flooding.

16:23:02 1 The government's actions must have caused worse flooding  
16:23:05 2 than would have occurred due to the forces of nature.  
16:23:08 3 I believe plaintiffs fail to meet this standard even  
16:23:12 4 under the most favorable viewing of the evidence. At  
16:23:14 5 most plaintiff has shown what I describe as minor and  
16:23:19 6 occasional ponding of water on a portion of, a portion  
16:23:26 7 of, and I repeat that intentionally, the subdivision.  
16:23:32 8 What I mean by the latter comment is the back of several  
16:23:35 9 lots has been affected, not all the lots. And the  
16:23:39 10 testimony has been that this occurs after heavy rains.  
16:23:45 11 So we have a small portion of -- a small portion of the  
16:23:49 12 entire subdivision that has been, at best, affected by  
16:23:54 13 this ponding. What is undisputed is that it does not  
16:23:58 14 interfere with the use of those lots themselves. In  
16:24:00 15 fact, on one of them, a family has been living for some  
16:24:07 16 time, and there's no testimony that this has interfered  
16:24:10 17 with the ability to construct another home on those lots  
16:24:14 18 that do not currently have a home.

16:24:17 19 I believe plaintiff has failed to show great  
16:24:19 20 frequency or that the accumulation is greater than what  
16:24:22 21 would occur without the City's conduct in this case, and  
16:24:27 22 specifically referencing the flooding, the severance of  
16:24:30 23 the pipe. And there is insufficient evidence to submit  
16:24:33 24 this claim to a jury. The same result would hold under  
16:24:36 25 the Ohio Constitution where a City can be liable if it

16:24:40 1 changes the flow of surface water so as to physically  
16:24:44 2 encroach upon the property of another by continued  
16:24:47 3 flooding which deprives the owner of any of the use and  
16:24:50 4 enjoyment of his property, and to borrow an analogy, I  
16:24:55 5 suppose, that Mr. McCarthy can still barbecue in his  
16:24:59 6 backyard and has not been deprived of any use and  
16:25:02 7 enjoyment of his property. In fact, he still uses his  
16:25:05 8 property with his family. So even under this standard  
16:25:08 9 as well, plaintiff fails to produce sufficient evidence  
16:25:11 10 for that claim to go to the jury.

16:25:13 11 Next, briefly addressing the takings claim  
16:25:16 12 in the context of tree and vegetation removal.  
16:25:19 13 Plaintiff here again fails to present sufficient  
16:25:21 14 evidence to warrant submitting the physical taking claim  
16:25:24 15 to a jury. The taking clause of the Fifth Amendment  
16:25:29 16 which plaintiff claims under this case requires that the  
16:25:36 17 clear sort of taking occur when the government  
16:25:40 18 encroaches upon private land. A minimal, quote,  
16:25:43 19 "permanent physical occupation of real property," end  
16:25:47 20 quote, may require compensation under the clause. I  
16:25:52 21 concede that. But even if minimal, the occupation must  
16:25:56 22 be permanent. And I don't believe plaintiff has shown  
16:25:58 23 a permanent occupancy here, but rather a one-time  
16:26:03 24 destruction or removal of trees and other vegetation  
16:26:06 25 that, if not replaceable, can certainly be replanted,

16:26:10 1 and if not replaced at its preexisting height, certainly  
16:26:14 2 can be compensated in damages otherwise for what was  
16:26:18 3 taken, especially considering what is admitted to be a  
16:26:22 4 relatively narrow area of potential encroachment. By  
16:26:27 5 that I mean the testimony seems to be a fight over four  
16:26:31 6 inches, up to six, seven, eight, maybe nine feet along,  
16:26:37 7 again, a sliver of the rear portion of the subdivision.  
16:26:41 8 Now, there is no evidence the City occupies any of  
16:26:43 9 plaintiff's land or has rendered it unusable in any way  
16:26:47 10 as a result of the removal of the trees or vegetation.  
16:26:50 11 And while a temporary invasion may constitute a  
16:26:54 12 compensable taking, the U.S. Supreme Court has held that  
16:27:00 13 this situation applies, that is, a taking here where all  
16:27:03 14 use of the property is denied, and we don't have that in  
16:27:09 15 this case under any circumstances.

16:27:12 16 I also find under U.S. v. Harris, 467, F.2d,  
16:27:16 17 801, Eighth Circuit, "A distinction is therefore to be  
16:31:07 18 drawn between mere tortious invasion of one's property  
16:31:11 19 rights and an appropriation of sufficient magnitude to  
16:31:15 20 amount to a taking."

16:27:31 21 And it cites a U.S. Supreme Court case in  
16:27:33 22 that quote.

16:27:35 23 In this case, the cutting/removal of trees  
16:27:38 24 and brambles under this standard is best understood as a  
16:27:41 25 tortious invasion to property occurring through

16:27:43 1 negligence or trespass.

16:27:46 2           The same holding under the Ohio Constitution  
16:27:49 3 for the vegetation removal. A taking requires under  
16:27:52 4 Ohio law a, quote, "substantial or unreasonable  
16:27:55 5 interference with a property right," end quote. And the  
16:27:59 6 question here is whether removal of the trees and  
16:28:02 7 vegetation deprive plaintiff of, quote, "any valuable  
16:28:06 8 use," end quote, of the property. And the evidence  
16:28:08 9 does not bear out any such.

16:28:12 10           For these reasons I am going to grant a  
16:28:19 11 directed verdict with respect to the taking claim, the  
16:28:24 12 1983 claim, and will submit two claims to the jury; that  
16:28:28 13 is, the trespass claim and the negligence claim.

16:28:31 14           Anything further from either side? If  
16:28:35 15 not, we will retire to chambers to have a discussion on  
16:28:39 16 the jury charge.

16:28:40 17           MR. BAHRET: If I heard what you just said  
16:28:42 18 correctly when you were describing the taking claim in  
16:28:44 19 the context of the water issue, I believe you said that  
16:28:48 20 you failed to see sufficient evidence to indicate that  
16:28:54 21 the water problem was worse now than it was before.

16:28:57 22           THE COURT: I said there was evidence to  
16:28:59 23 that effect.

16:28:59 24           MR. BAHRET: You said there was?

16:29:01 25           MR. ROBON: I thought you said no.

16:29:04 1 THE COURT: As I recall there was testimony,  
16:29:08 2 I forget now from whom, perhaps it was young McCarthy,  
16:29:12 3 who indicated it was no worse than it was before or was  
16:29:17 4 in the same area that it was before. Am I right or  
16:29:20 5 wrong?

16:29:20 6 MR. BAHRET: I believe you're right. But I  
16:29:22 7 guess my point is I don't think there's sufficient  
16:29:25 8 credible evidence, especially not scientific evidence,  
16:29:29 9 that any flooding problem is because of that pipe being  
16:29:33 10 cut.

16:29:34 11 THE COURT: Well, I think that's an issue  
16:29:36 12 that perhaps we'll let the jury determine.

16:29:40 13 MR. WATKINS: If I can make one more quick  
16:29:42 14 inquiry. If it's your intention we're going to go, can  
16:29:47 15 I put on the record some of what I want to make sure is  
16:29:51 16 on the record to protect ourselves about the  
16:29:53 17 instructions regarding negligence and trespass?

16:29:56 18 THE COURT: We haven't had our charge  
16:29:58 19 conference yet. We're going to go into chambers, talk  
16:30:01 20 off the record, and to the extent you don't agree with  
16:30:03 21 my final charge -- this is a draft -- then you can make  
16:30:06 22 your record tomorrow morning.

16:30:08 23 MR. WATKINS: Very good. Thank you.

24 (Adjourned at 4:30 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled  
matter.

/s Tracy L. Spore\_\_\_\_\_

\_\_\_\_\_

Tracy L. Spore, RMR, CRR

Date

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